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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~228~~. 26

WILLIAM D. THOMPSON, THOMAS H. JENKINS, ANDREW MOODY ET AL., APPELLANTS,

vs.

THE WHITE WATER VALLEY RAILROAD COMPANY AND THE INDIANAPOLIS, CINCINNATI, AND LAFAYETTE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED MARCH 25, 1886.

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INDEX.

	Original.	Print.
Caption	1	1
Original bill of complaint	2	2
Exhibit A—Agreement between the I. C. & L. R. R. Co. and the White Water Valley R. R. Co., Nov. 4, 1867	16	7
B—Agreement between the I. C. & L. R. R. Co. and the Hagerstown Ass'n of the W. W. V. R. R., Dec. 7, 1867	27	11
C—Directors' meeting, July 12, 1869	30	13
D—Certificate of stock of Juliet T. Wright	34	14
E—Agreement and grant between the I. C. & L. R. R. Co. and the Hagerstown Ass'n of the W. W. V. R. R., Apl. 28, 1868	35	15
F—Agreement between the I. C. & L. R. R. Co. *et al.* and the Hagerstown Ass'n, Apl. 24, 1868	39	16
Order making new parties defendant, &c.	43	18
Answer and cross-bill of Juliet T. Wright *et al.* (withdrawn)	43	18
Answer of the White Water Valley R. R. Co.	43	19
Exhibit A—Agreement between the Columbus & Indiana Central R. R. Co. *et al.* and the Cincinnati and Indiana R. R. Co. *et al.*, Nov. 14, 1867	55	23

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	Original.	Print.
Exhibit B—Agreement between the Indianapolis, Cincinnati & Lafayette R. R. Co. and the White Water Valley R. R. Co., January 26, 1871	62	26
Appearance for I. C. & L. R. R. Co.	69	29
Motion to dismiss cross-bill of Broadwell *et al.*	69	29
Answer of the I. C. & L. R. R. Co.	70	29
Exhibit No. 1—Agreement between the Indianapolis, Cincinnati & Lafayette R. R. Co. and the White Water Valley R. R. Co., January 26, 1871	79	33
2—Agreement between the Cincinnati & Indiana R. R. Co., the Indianapolis, Cincinnati & Lafayette R. R. Co., the White Water Valley R. R. Co., and the Harrison Branch Co., Apl. 25, 1871	85	36
Notice of application for appointment of a receiver	91	38
Order on application of the Indianapolis Rolling Mill to be made party	92	39
Order on application of Broadwell and others to be made parties	93	39
Application of Broadwell and others to be made parties	93	40
Order overruling motion for appointment of receiver	95	40
Order on W. W. V. R. R. Co. to keep accounts	95	40
Replication to answers	95	40
Order as to withdrawal of answer and cross-bill of Broadwell *et al.*	95	41
Replication to answer	96	41
Motion to strike from files the deposition of Mr. Prentiss	97	41
Motion to amend answer of W. W. V. R. R. Co.	102	43
Amendment to answer	103	44
Amendment to answer (not set out)	105	45
Rule to reply to amendments to answer	105	45
Amended bill	105	45
Supplemental bill	107	46
Order as to motion for injunction	110	47
Appearance for Parkman & Short	111	48
Plea to supplemental bill by Henry Parkman, receiver	111	49
" " " "	113	49
Order making W. W. V. R. R. Co. party defendant, &c.	116	50
Dismissal as to James J. Storrow *et al*	117	50
Answer of the White Water Valley R. R. Co	118	51
Motion to suppress depositions	136	58
Replication to answer	137	59
Order as to taking testimony, &c.	139	59
Order allowing motion to file amendment to bill, &c.	139	60
Amendment to bill	140	60
Amendment to answer, &c.	141	60
Motion to terminate appointment of examiner	143	61
Final decree	143	61
Order allowing appeal, &c.	145	62
Order on petition for allowance of new appeal	146	62
Petition for new appeal	146	63
Order dismissing petition for new appeal, without prejudice	148	63
Order allowing appeal	148	63
Bond filed	148	64
Citation	149	64

	Original.	Print.
Marshal's return on citation	149a	64
Evidence for complainants	150	64
Notice to take testimony	150	65
Testimony of Henry Prentiss	151	65
S. J. Broadwell	163	71
Henry Prentiss (resumed)	171	75
Commissioner's certificate, &c.	204	91
Exhibit A. (Prentiss)—Resolution ratifying agreement of Sept. 7, 1867	208	92
B. " Proceedings of Board, July 1869	212	94
Notices to take testimony	216	95
Testimony of Henry C. Lord	217	96
Commissioner's certificate	222	98
Notices to take testimony	223	99
Testimony of D. Thew Wright	225	100
M. E. Ingalls	226	100
Notary's certificate, &c.	227	101
Exhibit (Wright)—Same as Exhibit 2 to answer of I. C. & L. R. R. Co.	228	102
Exhibit A (Ingalls)—Letter of Chapman Dwight to M. E. Ingalls, Oct. 27, 1871	235	105
Notice to take testimony	236	105
Testimony of Edward F. Osborne	237	107
Commissioner's certificate	241	108
Exhibit A (Osborne)—Contract of I. C. & L. R. R. Co. with W. W. V. R. R. Co., Nov. 4, 1867	242	108
B " Proceedings of Board, Dec. 6, 1867, &c.	251	112
C " Certificate of stock	259	115
D " Proceedings of Board, Apl. 23, 1868, &c.	260	116
F " Proceedjngs of stockholders, Nov. 2, 1868, &c.	271	122
Testimony of D. Thew Wright	274	123
E. F. Osborne	275	124
Henry C. Lord	276	124
A. B. Williams	291	131
Exhibit A (Williams)—Agreement for right of way	296	134
Notice to take testimony	298	135
Testimony of Henry C. Lord	298	135
Commissioner's certificate	300	136
Testimony of A. B. Williams (recalled)	301	136
Henry C. Lord (recalled)	301	136
Exhibits (Williams)—Copies of grants of right of way	303	137
Testimony of Henry C. Lord (recalled)	315	144
Examiner's certificates, &c.	320	146
Clerk's certificate	322	147

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday in May, in the year of our Lord one thousand eight hundred and eighty-four, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

WILLIAM D. THOMPSON, THOMAS H. JENKINS, Andrew Moody, Benjamin E. Smith, Henry C. Lord, Joseph H. Rhodes, Lucinda Chapman (Samuel J. Broadwell and Daniel Thew Wright, trustees), Indianapolis Rolling Mill Company, Samuel J. Broadwell, Nathaniel Wright, Sr., William Burnett Wright, Mary T. W. Carven, Juliet T. Wright, Louisa W. Stephenson

vs.

THE WHITE WATER VALLEY RAILROAD COMPANY, The Indianapolis, Cincinnati and Lafayette Railroad Company, Samuel J. Broadwell, Nathaniel Wright, Sr., William Burnett Wright, Mary T. W. Carwen, Juliet T. Wright, by Her Next Friend, Daniel Thew Wright; Louisa W. Stephenson, by Her Next Friend, R. H. Stephenson,

Original Bill. Chancery. 3311.

and

SAMUEL J. BROADWELL, NATHANIEL WRIGHT, Sr., William Burnett Wright, Mary T. W. Corwen, Juliet T. Wright, by Her Next
2 Friend, Daniel Thew Wright; Louisa W. Stephenson, by Her Next Friend, R. H. Stephenson,

vs.

WILLIAM D. THOMPSON, THOMAS H. JENKINS, Andrew Moody, Benjamin E. Smith, Henry C. Lord, Joseph H. Rhodes, Lucinda Chapman, The Indianapolis, Cincinnati and Lafayette Railroad Company, and The White Water Valley Railroad Company.

Cross-Bill.

Be it remembered that heretofore, to wit, at the November term of said court, on the 13th day of November, A. D. 1873, before the Honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court, the following proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by H. Crawford, Esq., their solicitor, and file their bill of complaint herein in the words following, to wit:

To the honorable judges of said court, in chancery sitting:

Humbly complaining, your orators, William D. Thompson and Thomas H. Jenkins, who are both citizens of the State of New York; Andrew Moody, who is a citizen of the State of New Hampshire; Benjamin E. Smith, Henry C. Lord, Joseph H. Rhodes, Daniel Thew Wright, who are all citizens of the State of Ohio, and who sue
3 herein in their own behalf and that of all other certificate-holders similarly situated, exhibit this bill of complaint against The White Water Valley Railroad Company and The Indianapolis, Cincinnati & Lafayette Railroad Company, both said corporations being organized under the laws of Indiana, and both being citizens of Indiana, and thereupon show to the court—

That in the year 1865 the said White Water Valley Railroad Company was duly organized under the laws of the State of Indiana with full authority to locate, construct, and operate a line of railway from Hagerstown, in Wayne county, Indiana, to the town of Harrison, Dearborn county, on the boundary line between the States of Indiana and Ohio, and thereafter, on or about the 4th day of November, 1867, the said line of railway was partially constructed and in operation—that is to say, from the town of Cambridge City continuously to the town of Harrison aforesaid—and at the said date the said White Water Valley railroad was without equipment and the said corporation without the means to purchase the same or to fully complete the said line of railroad as originally contemplated, and on the day last aforesaid made a certain contract in writing (a copy of which is herewith filed and. made a part of this bill, marked Exhibit
4 A) with the said Indianapolis, Cincinnati & Lafayette Railroad Company, whereby, in consideration of the certain guarantees theretofore made and the covenants and payments to be thereafter performed and made by the said Indianapolis, Cincinnati & Lafayette Railroad Company, the said last-named corporation agreed to supply all the necessary equipment, material, and operatives for and to operate the said line of railroad of the said White Water Valley Railroad Company for the period and upon the conditions and for the uses in the said contract specifically set forth.

And it was further agreed in and by the said contract that the said Indianapolis, Cincinnati & Lafayette Railroad Company should at its own expense proceed to finish in good and safe running order for the accommodation of the public that part of the said line of railroad then actually uncompleted—that is to say, the section thereof between Hagerstown and Cambridge City, being a distance of about eight miles—and that in the construction of the said section the said Indianapolis, Cincinnati & Lafayette Railroad Company might adopt any reasonable plan, and upon such completion the said last-named corporation were to be entitled perpetually to the entire income, profits, and earnings of the same.

5 And thereupon the said Indianapolis, Cincinnati & Lafayette Railroad Company entered into full possession and enjoyment of the said line of railway from Cambridge City to Harrison and so continued for about the term of three years, and while in such possession the said Indianapolis, Cincinnati & Lafayette Railroad

Company, for the purpose of performing its covenants under the said agreement and in order to open and maintain a connecting line of railway at Hagerstown with the Columbus, Chicago & Indiana Central railroad and interchange business with the said last-named corporation in accordance with the terms of an agreement with the said last-named corporation, by its duly constituted agents, on the 7th of December, 1867, made and entered into a certain written contract, a copy of which is herewith filed and made part hereof, marked Exhibit B, with Benjamin E. Smith and Henry C. Lord for the construction of said line of railroad from Hagerstown to Cambridge City, and in consideration of such construction the said Indianapolis, Cincinnati & Lafayette Railroad Company agreed to issue to said Lord and Smith or such parties as they might suggest the obligations of the said last-named railroad company to the aggregate of $205,000, divided into shares of $100 each, which obligations should be transferable on the
6 books of said last-named corporation like shares, the principal thereof being irredeemable but bearing a perpetual interest at the rate of 8 % per annum, payable semi-annually on the first days of June and December of each year.

And your orators show that the said line of railroad was duly completed under said contract and accepted by the chief engineer, and the said Indianapolis, Cincinnati & Lafayette Railroad Company from about July 1, 1868, continuously until about May 1, 1871, remained in the possession and use of said section of road and received and enjoyed the revenue of the same, and, as required by the said contract, there was duly issued to said Smith and Lord and those they designated the full sum of $205,000 of such certificates as aforesaid.

And on the 28th day of April, 1868, while the said work was in progress and in order to better secure the prompt payment of such 8 % interest, it was agreed between the said contractors and the said Indianapolis, Cincinnati & Lafayette Railroad Company that the holders of such certificates should have a perpetual lien on all the earnings and income of the said section of railroad to secure the payment of such semi-annual instalments of interest as aforesaid
7 and on the 23rd of April, 1868, the said last-named railroad, company, by its board of directors, adopted a resolution giving such lien as aforesaid.

And at the regular annual meeting of the shareholders of said Indianapolis, Cincinnati & Lafayette Railroad Company then next ensuing, viz., on Nov. 2, 1868, each and every of such matters were ratified and confirmed.

And on the — day of ——, 1868, the said White Water Valley Railroad Company, in order to more fully protect and assure the engagements aforesaid, agreed to and ratified the said contract and the lien aforesaid in all things and directed the president of said corporation, under its corporate seal, to execute or join in any instrument of writing necessary or proper to effectuate the agreement for such lien as aforesaid; and your orators attach hereto a copy of the resolution passed by the board of directors of said White Water Valley Railroad Company in that behalf, marked Exhibit "C."

And your orators show that no consideration was ever paid for the work done and materials furnished in the construction of said line of railroad except the execution and delivery of the said $205,000 of certificates as aforesaid; and, in accordance with the
8 provisions of said contract, the said Indianapolis, Cincinnati & Lafayette Railroad Company has, since the said Dec. 7, 1867, kept at its principal office a book wherein was registered the transfer of said certificates from time to time, and new certificates were issued to the transferees on the surrender of original certificates; and there have been divers transfers from time to time, and the present holders of such certificates and the amount held by each is, as your orators are advised, as follows:

William Bryant	16 shares.
Samuel J. Broadwell	131 "
Mary T. W. Corwen	85 "
Lucinda A. Chapman	60 "
J. B. Green & Bro.	10 "
Indianapolis Rolling Mill	135 "
Thomas H. Jenkins	50 "
Andrew Moody	100 "
J. H. Rhodes	137 "
Louisa W. Stevenson	50 "
Benjamin E. Smith	238 "
William D. Thompson	187 "
William B. Wright	50 "
Nathaniel Wright	65 "
Julia F. Wright	165 "
Henry C. Lord	71 "
Samuel J. Broadwell } Daniel T. Wright }	500 "

And your orators attach hereto a copy of one of the said certificates, marked "D," the others being similar except in the amount and name of owner thereof.

9 And the said Indianapolis, Cincinnati & Lafayette Railroad Company continuously from said Dec., 1867, to June 1, 1870, fully and promptly kept its covenants, and out of the earnings and income of said section of railroad paid the regular semi-annual instalments of interest falling due on said obligations, but since the date last aforesaid no interest has been paid to the holder of any such certificates since the said 1st day of June, 1870.

And your orators further show that in pursuance of the said order of the board of directors and order of shareholders of the said Indianapolis, Cincinnati & Lafayette Railroad Company that on the 20th day of November, A. D. 1868, the said Indianapolis, Cincinnati & Lafayette Railroad Company did sign, seal, and deliver, by her duly authorized agents and officers, a paper writing declaring and effectuating a lien upon the said section of railroad and all its income and earnings and irrevocably setting apart and pledging all the said income to the payment of the said semi-annual interest to each and every of such certificate-holders. The said agreement was dated

on April 28, 1868, and a copy of the same is hereto annexed, marked Exhibit "E."

And your orators further show that on the 10th day of July,
10 1869, in order to carry out the order and resolution of the board of directors hereinbefore set forth, the said White Water Valley Railroad Company, by its proper and thereto duly authorized agents, did (jointly with the said Indianapolis, Cincinnati and Lafayette Railroad Company) make, execute, sign, seal under its corporate seal, and deliver a certain paper writing, commonly called a mortgage, wherein and whereby the said obligations of the said corporations hereinbefore mentioned were recited, and that such lien as aforesaid had been contracted to be given on the said section of railroad, and did therein convey unto the said Benjamin E. Smith and Henry C. Lord, in trust to secure the said lien of each and every of said scrip-holders and with the right to take possession of all and singular the said section of railroad for any default in the payment of interest, all and singular the said section of railroad and its income and earnings; and your orators annex hereto a copy of the said trust conveyance by the said White Water Valley Railroad Company and the said Indianapolis, Cincinnati and Lafayette Railroad Company, marked Exhibit "F," and pray that the same may be taken as part of their bill herein.

And on or about May 1, 1871, it was agreed by and be-
11 tween the said two railroad corporations that the said original contract of November 4, 1867, should be cancelled, and the said White Water Valley Railroad Company was to enter into the possession and enjoyment of the said line of railroad from Hagerstown to Harrison, and was to operate the same and receive all the earnings thereof; and the said White Water Valley Railroad Company, with full knowledge of all and singular the agreements and matters aforesaid and without the payment of any consideration whatever to the said Indianapolis, Cincinnati & Lafayette Railroad Company, entered into possession of the said section of railroad and has been continuously since May, 1871, operated the same and received the revenue and earnings thereof, amounting, as your orators charge, to the sum of $100,000; and it was distinctly and in writing agreed by and between the said railroad companies that the said White Water Valley Railroad Company should, as a part consideration for the surrender to it of said railroad from Hagerstown to Cambridge City, recognize the just lien and priority of all the holders of such certificates, and should and would either pay and discharge the interest thereupon perpetually or make other satisfactory arrangement with such holders, or, failing therein, would
12 surrender to the said Indianapolis, Cincinnati & Lafayette Railroad Company the possession of the said section of railroad from Hagerstown to Cambridge City and cease to operate the same or receive the earnings thereof.

And your orators charge the fact to be that the said White Water Valley Railroad Company has taken and maintained possession of the said section of railroad since the said May, 1871, to this time, and has been and is daily in the receipt of all the earnings there-

from, and, wholly disregarding its obligations in the premises, has misappropriated the said earnings to its own private use and not to the purpose for which they were specifically pledged and set apart, and has wholly failed and neglected and refused to pay unto your orators any portions of the sums of money due them for arrears of interest upon the said certificates, and the same remain unpaid and justly due unto your orators and other certificate-holders, to the amount of about $50,000; which said trust funds justly belonging to your orators and other certificate-holders have been wrongfully and fraudulently received and appropriated by the said White Water Valley Railroad Company to its own use; and the said last-named corporation,
13 by its officers and agents, do now give out and pretend that neither your orators or any other certificate-holders have any lien or equity in or upon the said section of railroad from Hagerstown to Cambridge City or to any of its earnings or income, but that, on the contrary thereof, the said White Water Valley Railroad Company has the full and complete title to the said section of railroad free from any lien by reason of the matters aforesaid, and with the full authority to receive all the earnings and revenue therefrom and appropriate the same to its own use without any payment to or account therefor unto your orators or other certificate-holders, and do expressly refuse to make such payment and account or in any manner to recognize the just liens and equities of your orators.

All which actings and doings are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators and all other holders of such certificates.

In consideration whereof and forasmuch as your oratiors are entirely remediless at any by the strict rules of the commen law, and can only have relief in equity, where such matters are prop-
14 erly cognizable and relievable, your orators pray that an account may be taken of the several sums so due to your orators and other certificate creditors as aforesaid, and an account be also taken of the income and trust funds appropriated unto your orators and others standing in the same relation, and so seized upon and appropriated by the said White Water Valley Railroad Company; and your orators pray for a decree against the said last-named corporation for the amount of the several sums of money due to your orators and all other certificate-holders, and that the said corporation be ordered and decreed to pay the same into court; and your orators pray for the enrollment of a decree quieting and adjudging the just lien, equities, and priorities of your orators and other certificate-holders in, to, and upon the said section of railroad aforesaid and all its income and earnings, and decreeing the just liability of the said White Water Valley Railroad Company to pay the said semi-annual installments of interest at and after the rate of 8% per annum on said $205,000 of certificates, and enjoining and restraining the said White Water Valley Railroad Company from any and all acts, mortgages, guarantees, leases, or other contracts that will in any manner defeat or diminish the just lien and pri-
15 ority of your orators in and upon the said section of railroad and its income.

And your orators pray that for default of the payment of such sum of money so due them, as aforesaid, that the said mortgage be foreclosed and the property therein described be sold to satisfy the said debt in case the same cannot be satisfied out of the property and assets of the said White Water Valley Railroad Company; and your orators pray for the appointment of a receiver of the said section of railroad in order to receive and disburse the said pledged income, or that they be let into possession of the same in accordance with the said agreement aforesaid; and your orators pray for an injunction restraining the said White Water Valley Railroad Company from any appropriation of the income of said section of railroad other than the payment of the arrears and current instalment of interest due unto your orators and other certificate-holders until the same be fully paid.

And your orators pray for such other and further relief as may be necessary and proper in the premises.

WILLIAM D. THOMPSON &
OTHER COMPLAINANTS.

HENRY CRAWFORD, *Solicitor.*

16 STATE OF INDIANA, } ss:
Marion County, }

Henry C. Lord upon his oath says that he is one of the complainants in the foregoing bill of complaint, and that he has read the foregoing bill and knows the contents thereof, and that the facts stated in said bill are true.

H. C. LORD.

Subscribed and sworn to before me this Nov. 12, 1873.
[SEAL.] FRANK B. McDONALD,
Notary Public.

EXHIBIT A.

This agreement, made and entered into this fourth day of November, 1867, between the Indianapolis, Cincinnati & Lafayette Railroad Company, party of the first part, and the White Water Valley Railroad Company, party of the second part, both being corporations organized under the laws of the State of Indiana, witnesseth:

That whereas said party of the first part is possessed, in part as owner and in part under certain contracts with the Cincinnati and Indiana Railroad Company, of a certain line of railroad extending from Lafayette, in the State of Indiana, to the city of Cincinnati, in Ohio, with a branch in the State of Ohio which at the
17 town of Harrison connects with the railroad of the party of the second part, which said line of railroad, composed of a main line in Indiana, with an extension into and a branch line in Ohio, said party of the first part is now operating and transacting business upon;

And whereas said party of the second part owns a line of railroad from said Harrison to Hagerstown, in Indiana, which is not yet com-

pleted beyond Cambridge City, but it is its desire to complete to Hagerstown, but is without means to do so, and its said line of railroad is encumbered by a mortgage for one million of dollars and interest, and being without equipment or resources to procure the same it is unable to operate the said road or without aid to pay such interest as the same shall semi-annually become due and is thus in danger of forfeiting its charter and losing its property; and whereas, to enable said railroad of said party of the second part to be completed to Hagerstown and to be maintained, operated, and used as the laws of the land and the convenience of the public require, said parties desire to enter into a perpetual running arrangement whereby the interests of both and of the public may be promoted:

18 Now, therefore, to the end aforesaid said, parties have agreed and do agree—

1st. That the party of the second part have placed the party of the first part in possession of the railroad aforesaid, granting them the right perpetually to use and operate the same, viz., from said Harrison to Hagerstown, and do hereby covenant and agree forever to maintain said party of the first part in the quiet and peac-able possession and use of said railroad, including the lands, rights of way, bridges, culverts, tracks, sidings, station-houses, water-tanks, and station machine and car shops and fixtures, and other the property, real and personal, rights, privileges, and franchises thereof or thereunto appurtenant, from Harrison to Hagerstown, and every part and parcel of the same, and will warrant and defend the same against the claims of all persons claiming under said mortgage and of all other persons whomsoever lawfully claiming. The above-described property is, it is hereby agreed, to be understood to include all rights of the party of the second part, and every species of interest it has acquired, whether by contract with or conveyance from the White Water Valley Canal Company or otherwise in and to the estate and property, rights and interest which were of the

19 said last-named company, or are or were in the White Water Valley Canal, its towing path, berm-bank, locks, or hydraulic or water power therewith connected or other appurtenances thereof.

2nd. In consideration of the premises and for the purposes aforesaid, and so as to make a permanent business connection between said railroad at the town of Harrison, and so to extend the business of the party of the second part into the State of Ohio and to the city of Cincinnati, for the better accommodation of the public and to secure the prompt and economical equipment of said last-named party and bring its road into immediate and beneficial use, the said party of the first part doth hereby covenant and agree to and with the party of the second part, its successors and lawful assigns, that it will place upon said railroad of the party of the second part, and will forever maintain thereon, an ample and sufficient equipment to do all the business that may offer; that it will forever maintain said line of railroad, including tracks, sidings, depots, station-houses, water-tanks, and station machine and cars hops, road-bed and superstructure, and all the appurtenances thereof, in complete order and repair for safe and constant use as a first-

20 class railroad, and will manage and operate the same well and faithfully for the accommodation and safety of the public, and will forever furnish those doing business thereon all the advantages of commerce with the city of Cincinnati and other places by a close connection with the trains of said party of the first part running to and from Harrison and within the State of Ohio, or by running at the option of said party of the first part, the same train or trains in both said States, and will discharge forever in the management and operation of said railroad and said extension when completed all the duties and services which the party of the second part is required by law to do and perform; and, further, the said party of the first part will hold and save said party of the second part harmless and will indemnify it against all claims from damages growing out of any act or omission of said party of the first part, its officers, agents, and servants, in the operation and management of said railroad or in the maintenance and repair thereof, and will pay quarterly, in equal instalments of thirty-five thousand dollars each, to the party of the second part the annual sum of one hundred and forty thousand dollars, such payments to be made on the
21 first days of March, June, September, and December in each year, in lawful currency of the United States: Provided, That whereas the party of the first part has guaranteed the payment of the coupons or interest warrants at the rate of eight per cent. per annum on bonds of the party of the second part, secured by said mortgage to the amount of one million dollars, to secure the payment of which said party of the second part has provided for the creation of a sinking fund to the amount of fifteen thousand dollars per year, to be invested in said bonds or otherwise under the charge of the trustees named in said mortgage: Now, upon the payment of any such interest warrants or coupons or of any other interest warrants or coupons of said party of the second part which said party of the first part may hereafter at any time guarantee or agree to pay, the amount of any such coupons or interest warrants so paid shall be credited to said party of the second part upon surrender of the same to be cancelled upon any instalment or instalments then due or next to become due thereafter of said annual payment, and said party of the first part shall always be entitled thus to dis-
22 charge to that extent its covenant herein with respect to such annual payment of one hundred and forty thousand dollars by payment of any such coupons or interest warrants as the same shall severally mature; and the party of the second part covenants with the party of the first part that said annual sum of fifteen thousand dollars shall be punctually applied for the purposes of a sinking fund, pursuant to the terms of said mortgage, and in the event that said party of the second part or the trustees named in its said mortgage shall at any time fail in any duty which either has assumed to discharge with reference to said sinking fund by not appropriating said annual sum or any part thereof for the purpose of said fund, or not investing or using the same as said mortgage both prescribed and provided, then and from thenceforth said party of the first part

shall have the right from time to time and at any — to retain such part of such annual sum of one hundred and forty thousand dollars as may be required to make up the amount then due to or not effectually applied for said sinking fund, applying the same without delay in purchase of said bonds of the second party at rate to be approved by said trustees or, if that cannot be done, then in
23 purchase of such other securities as said trustees shall approve, such bonds to be cancelled and held pursuant to said mortgage and such other securities so held as will secure their faithful application to the reduction of the mortgage, and for the amounts so retained and applied said party of the first part shall receive credit from said party of the second part upon the first instalment or instalments of said annual sum of one hundred and forty thousand dollars then next to become due and payable or that may have already accrued and matured, and that said party of the first part will forever also pay and discharge all taxes and assessments, national, State, county, municipal, or other that may be charged or assessed upon or on account of said railroad and its appurtenances or the business or traffic that may be done thereon, not including, however, the income tax that may be charged upon the income paid by said party of the first part to said party of the second part or upon the coupon or interest warrants aforesaid or upon any dividends upon the capital stock of said party of the second part.

3rd. And should said party of the first part fail in any respect
24 to keep its covenants herein or any of them or to make such payments on any part thereof, then said party of the second part may demand and receive possession of its said railroad and appurtenances as hereinbefore described, and thereafter may use and operate the same on its own account and for its own benefit.

4th. And, further, in consideration of the premises and inasmuch as the railroad is not constructed and finished from Cambridge City to Hagerstown and the second party is without the means of finishing it promptly, it is mutually agreed that said first party shall cause that portion of the road to be constructed and finished under the charter of the second party, at the cost and expense of said first party, and put in good and safe running order for the accommodation of the public, and shall be entitled to all the profits, income, and earnings of the same perpetually, which are hereby guaranteed to said first party and its assigns in case it completes the construction of said portion of the road, and in that case no further compensation is to be paid to the second party on account of said portion; and said first party may adopt any reasonable plan and em-
25 ploy any suitable person it may deem proper for said construction, and the parties so constructing the same, their agents and employees, shall have the right and authority to use the name and the corporate powers, privileges, and franchises of the second party in any proper manner in constructing the road, procuring right of way, or for any other proper purpose, said first party, however, agreeing to indemnify the second party against all claims for damages growing out of any act or omission in the course of construction; and said second party shall make no claim for any

rights or interest in the old canal, if any it have, which may be used or occupied in such construction, and said first party and its assigns are to have the benefit of all contributions or donations made or which may hereafter be made for the construction of said portion of the road.

It is agreed that the time of the acceptance of the entire railroad and the date from which the annual payment of the rent begins is the fourth day of November, eighteen hundred and sixty-seven, so that the first quarterly payment of thirty-five thousand
26 dollars will be due in full on the first day of March, eighteen hundred and sixty-eight, and the portion of a quarter accrued before the first day of December is to be paid at the same time.

In testimony whereof the said Indianapolis, Cincinnati and Lafayette Railroad Company, by their vice-president, W. W. Smith, and T. A. Morris and L. B. Lewis, a committee duly appointed by the board of directors for that purpose, and the White Water Valley Railroad Company, by their president, Henry C. Lord, and secretary, Iona Chapman, have caused their respective corporate seals to be hereunto affixed and their respective signatures annexed this fourth day of November, in the year eighteen hundred and sixty-seven.

THE INDIANAPOLIS, CINCINNATI AND LAFAYETTE R. R. Co.,
By W. W. SMITH, *Vice-President*,
T. A. MORRIS,
L. B. LEWIS,
Committee.

Attest:

[CORP. SEAL.] A. WORTH, *Sec'ty I., C. & L. R. R Co.*

THE WHITE WATER VALLEY R. R. CO.,
By H. C. LORD, *President*,

[CORP. SEAL.] IONA CHAPMAN, *Secretary.*

27 EXHIBIT B.

Memorandum of an agreement made this seventh day of December, in the year 1867, between the Indianapolis, Cincinnati and Lafayette Railroad Company, by their committee, W. W. Smith, vice-president, T. A. Morris, and L. B. Lewis, duly appointed and authorized for that purpose by the board of directors of that company, party of the first part, and Henry C. Lord and Benjamin E. Smith, acting in behalf of themselves and their associates, under the name of the Hagerstown Association of the White Water Valley Railroad, being an association formed for the construction and completion of said White Water Valley railroad from Cambridge City to Hagerstown, party of the second part, as follows:

Whereas, by agreement between the party of the first part and the White Water Valley Railroad Company, said last-named company has granted to said first party the perpetual use and possession of its railroad from Harrison to Hagerstown, which now is in posses-

sion and use of said first party; and whereas the part of said road between Cambridge City and Hagerstown has not been constructed by said White Water Valley Railroad Company, and by said
28 agreement the party of the first part has the right to cause the same to be constructed under the charter of said White Water Valley Railroad Company; and to make any reasonable contract with others for the construction of the same, and to apply and to pay the additional rent or compensation which would have been due to said White Water Valley Railroad Company if she had finished the road to any other party who should construct said unfinished portion of the road:

Now, therefore, it is mutually agreed between the parties hereto that said second party will construct and finish said railroad from Cambridge City and connecting therewith the railroad as already finished to Hagerstown, connecting therewith the Chicago and Great Eastern railroad, and will finish the same in a good and substantial manner as a first-class railroad, providing all requisite rights of way, grounds, and materials, with all necessary side tracks, depots, water stations, turn-tables, cattle-guards, culverts, bridges, and all other appendages and structures requisite to a first-class railroad; the iron rails to be of good quality, iron being not less than fifty-five pounds to the yard; the cross-ties to be of a length and size usual on first-class railroads and not less than twenty-four
29 hundred to the mile; the culverts and cattle-guards to be of good masonry, the road well ballasted, and the whole well finished as a first-class railroad, ready for use on or before the first day of April next, and so far built that it can be used temporarily as soon as the weather will permit, and said first party is to furnish without charge any rights of way or other conveniences for construction, if any such she should have or control along the portion of the road to be constructed, and said second party is to have the entire benefit of all subscriptions or donations which have been made or may hereafter be made for the construction of said portion *of said portion* of the road, and said first party is to furnish all reasonable facilities and conveniences for doing the work, and in payment for said construction said first party agrees to issue to said second party or to such persons as they may direct, and in such sums or amounts as they may desire, the obligations of said first party, devisable into shares of one hundred dollars each, transferable only on the books of said first party to the aggregate amount of two hundred and five thousand dollars, said obligations to be irredeemable, but bind-
30 ing said first party, to pay to the holders thereof forever an annual interest of eight per cent. per annum, payable semi-annually on the first days of June and December of each year at the office of said first party in Cincinnati, the same to bear interest from the first day of December, 1867, and to be issued as soon as the work is completed according to the contract and approval by the chief engineer of the party of the first part.

In testimony whereof the said Indianapolis, Cincinnati & Lafayette Railroad Company, by its committee above named, has caused its corporate seal to be affixed hereunto and the signatures of said

committee annexed and said Henry C. Lord and Benjamin E. Smith have annexed their signatures and seals this seventh day of December, 1867.

(Signed) W. W. SMITH,
Vice-President,
T. A. MORRIS,
L. B. LEWIS,
Committee.

Attest: A. WORTH, *Sec'y.*

H. C. LORD.
B. E. SMITH.

EXHIBIT C.

Directors' Meeting, July 12, '69.

On motion of Mr. Farquhar, the following resolution was adopted:

31 Whereas the several contracts approved and adopted at a meeting of the stockholders of this company held on the 30th day of October, 1868, and recorded in pages 27 to 44, inclusive, of this volume of records, had been approved by members of this board, but by mistake or inadvertence had not been formally adopted, or, if adopted, no record was made thereof: Now, therefore, for the purpose of placing the intention of the board duly on record, be it

Resolved, That this board adopt, approve, ratify, and confirm the said contracts and each one of them—viz:, the contract between the Indianapolis, Cincinnati and Lafayette Railroad Company, of one part, and the White Water Valley Railroad Company, of the other part, dated November 4th, 1867, recorded pages 27 to 34, inclusive; also the contract between the Indianapolis, Cincinnati & Lafayette Railroad Company, of one part, and Henry C. Lord and Benjamin E. Smith, in behalf of the Hagerstown Association of the W. W. V. R. R. Co., of the other part, dated December 7th, 1867, recorded pages 35 to 37, inclusive; also the contract between the Columbus and Indiana Central Railroad Company and the Chicago and Great Eastern Railroad Company, party of one part, and the

32 Cincinnati & Indiana Railroad Company, the Indianapolis, Cincinnati and Lafayette Railroad Company, and the White Water Valley Railroad Company, party of the other part, dated November 14th, 1867, recorded pages 38 to 42, inclusive; also an additional contract between the parties to the last named, bearing the same date, recorded in pages 43 & 44; and the president is and was authorized to execute each one of said contracts under the seal of this corporation, and the execution thereof is approved and confirmed.

The president laid before the board a copy of the following resolution, adopted by the board of directors of the Indianapolis, Cincinnati and Lafayette Railroad Company April 23rd, 1868, viz:

"Resolved, That the Hagerstown Association of the W. W. V. R

R. Co. and the members thereof, being the holders of the obligations or certificates issued or to be issued by the Indianapolis, Cincinnati and Lafayette railroad under a contract between them and the said association, dated 7th December, 1867, for the construction of the road from Cambridge City to Hagerstown, shall have a perpetual lien on the income and earnings of that section of the White
33 Water Valley railroad between Cambridge City and Hagerstown built by that association, to secure each and all of the obligations or certificates issued or that may at any time hereafter be issued by this company pursuant to the aforesaid contract with that association, in whatever form said obligations or certificates or any renewals, substitutions, or subdivisions thereof may be issued, the same being intended in nature of a perpetual rent on said section of the road; and the president or vice-president of this company or either of them is authorized to execute or join in any proper writing, under the corporate seal, granting and securing such lien."

And, on motion of Mr. Farquhar, it was unanimously resolved that this company assert to approve and confirm said resolution and authorize and direct the president of this company, in behalf of this company and under its corporate seal, to join in any instrument of writing granting and securing such lien, as is provided in said resolution of the Indianapolis, Cincinnati and Lafayette Railroad Company.

H. C. LORD, *President.*

I. CHAPMAN, *Sec'y.*

34 EXHIBIT D.

No. 29. STATE OF INDIANA. 165 shares.

Indianapolis, Cincinnati & Lafayette Railroad Co.; capital stock, $205,000; shares, $100 each.

Hagerstown Association of the W. W. V. R. R.

This certifies that Juliet T. Wright is the owner of one hundred and sixty-five shares of one hundred dollars each of the capital stock of the Hagerstown Association of the W. W. V. R. R., advanced at the instance of the Indianapolis, Cincinnati & Lafayette Railroad Company, lessees of the White Water Valley railroad, for the completion of said railroad from Cambridge City to Hagerstown, and said Indianapolis, Cincinnati & Lafayette Railroad Company bind themselves to pay perpetually to the holders of said stock an annual interest of eight per cent. per annum thereon, payable semi-annually on the first days of June and December in each year, at their office in Cincinnati, the principal of said sum being irredeemable and said stock being transferable only on the books of said company on surrender of this certificate.

In testimony whereof the said Indianapolis, Cincinnati & Lafayette Railroad Company have caused their corporate seal to be hereunto

affixed and the signature of their president and secretary annexed this tenth day of June, eighteen hundred and sixty-eight.

[CORP. SEAL.] H. C. LORD, *Pres't.*
A. WORTH, *Sec'y.*

35 EXHIBIT E.

Memorandum of an agreement and grant made this twenty-eighth day of April, eighteen hundred and sixty-eight, by and between the Indianapolis, Cincinnati & Lafayette Railroad Company, of the one part, and Benjamin E. Smith and Henry C. Lord, trustees, acting in the name and behalf of the Hagerstown Association of the W. W. V. R. R., of the other part.

Whereas the said Indianapolis, Cincinnati and Lafayette Railroad Co., lessees of the White Water Valley railroad, by contract dated December 7th, 1867, agreed with said Benjamin E. Smith and Henry C. Lord, acting in the name and behalf of the said Hagerstown Association (an association consisting of those who should at any time be holders of the obligations or certificates issued by the said Indianapolis, Cincinnati & Lafayette Railroad Co., pursuant to the contract aforesaid), that said association should construct that part of the railroad of the said White Water Valley Railroad Co. which lies between Cambridge City and Hagerstown, about seven miles in length, and that said Indianapolis, Cincinnati and Lafayette Railroad Co. should issue in payment therefor its irredeemable obligations or certificates to the amount of two hundred and five thousand dollars,
36 bearing a perpetual interest of eight per cent. per annum, payable semi-annually, transferable and divisible in manner of stock certificates, the same being intended in nature of a perpetual rent on said seven-mile section of road, as by said contract will more fully appear; and it was mutually agreed on surrender of said section of road by said association to said Indianapolis, Cincinnati & Lafayette R. R. Co. that said Hagerstown Association and all holders of such obligations or certificates should have a perpetual lien on the income and earnings of said section of road to secure the semi-annual payments thereon:

Now, therefore, be it known, and it is hereby agreed by the said Indianapolis, Cincinnati & Lafayette Railroad Co., in consideration of the premises, that the said Hagerstown Association and all holders of such obligations or certificates as aforesaid and of any renewals, subdivisions, or substitutions thereof in whatever form issued shall have a perpetual lien on the income and earnings of said section of road from Cambridge City to Hagerstown, to secure the punctual payment of all said semi-annual interest on said obligations or certificates, and said income and earnings are irrevocably pledged to them for that purpose; and, further, for carrying out the fore-
37 going purpose and for the consideration of one dollar to them paid by the said Benjamin E. Smith and Henry C. Lord, the said Indianapolis, Cincinnati & Lafayette Railroad Co. do hereby grant to the said Smith and Lord and the survivor of them and the heirs of the survivor in trust for the holders of all such obligations

and certificates as aforesaid a perpetual lien on the income and earnings of said section of railroad and a perpetual right and title to the same to secure all such semi-annual payments of interest as aforesaid.

In testimony whereof the said Indianapolis, Cincinnati & Lafayette Railroad Company has caused its corporate seal to be hereunto affixed and the signature of its vice-president annexed the day and year first above written.

[Seal Indianapolis, Cincinnati & Lafayette R. R. Co.]

W. W. SMITH,
Vice-President of I., C. & L R. R. Co.
HENRY C. LORD,
BENJAMIN E. SMITH,
Trustees of the Hagerstown Association of the W. W. V. R. R. Co.

Witnesses:
THOS. MORAN.
W. T. BOAZ.

38 STATE OF OHIO, }
Hamilton County, } *ss:*

Before me, W. T. Boaz, a notary public within and for the county of Hamilton aforesaid, personally came W. W. Smith, vice-president of Indianapolis, Cincinnati and Lafayette Railroad Company, and acknowledged the within instrument of writing to be the act and deed of the said Indianapolis, Cincinnati and Lafayette Railroad Company.

In testimony whereof I have hereunto set my hand and official seal this twentieth day of November, A. D. 1868.

[Notarial Seal, Hamilton County.]

W. T. BOAZ,
Notary Public.

STATE OF OHIO, }
Franklin County, } *ss:*

Before me, a notary public in and for said county of Franklin, personally came Benjamin E. Smith, trustee of the Hagerstown Association of the W. W. V. R. R. Co., and acknowledged the within instrument of writing to be his voluntary act and deed.

In testimony whereof I have hereunto set my hand and notarial seal this 12th day of December, 1868.

[Notarial Seal Franklin County.]

MORTON E. BRAZIO,
Notary Public.

39 EXHIBIT F.

Memorandum of an agreement made this twenty-fourth day of April, in the year 1868, by and between the Indianapolis, Cincinnati & Lafayette Railroad Company and the White Water Valley Railroad Company, party of the first part, and Benjamin E. Smith

and Henry C. Lord, trustee, acting in behalf of the Hagerstown Association, party of the second part, as follows, viz:

Whereas the said Indianapolis, Cincinnati & Lafayette Railroad Co., lessees of the said White Water Valley R. R. Co., by a contract, dated December 7th, 1867, agreed with said Benjamin E. Smith and Henry C. Lord, acting in the name and behalf of said Hagerstown Association of the said W. W. V. R. R. (an association composed of those who should at any time be holders of the obligations or certificates issued or to be issued by the Indianapolis, Cincinnati & Lafayette R. R. Co. pursuant to the contract aforesaid), that said association should procure the right of way and construct, on a line to be agreed on, that part of the railroad of said White Water Valley Co. between Cambridge City and Hagerstown at their own expense, and that said Indianapolis, Cincinnati & Lafayette R. R. Co.
40 should issue in payment therefor its irredeemable obligations or certificates to the amount of two hundred and five thousand dollars, bearing perpetual interest of eight per cent. per annum, payable semi-annually, transferable and divisable in the usual form of stock certificates, the same being intended in nature of a perpetual rent on said section of road, as by said contract will more fully appear; and it was mutually understood and agreed between the parties hereto, before advancing the money for the construction of said road and the issuing of said obligations or certificates, that all holders thereof should have a perpetual lien on said section of railroad from Cambridge City to Hagerstown and all income and earnings thereof to secure all such obligations or certificates:

Now, therefore, this memorandum witnesseth: That it is mutually agreed between the parties hereto that said Hagerstown Association and all holders of said obligations or certificates and of any renewals, subdivisions, or substitutions thereof, in whatever form issued, shall have a perpetual lien on said section of road and on all the income and earnings thereof to secure all such obligations or certificates and the payment of the stipulated annual interest thereon, and on default of payment shall have the right to take
41 possession and hold till payment is received; and, further, for the more perfect establishment of said lien, the said party of the first part, in consideration of the premises and of one dollar to them paid by the said Benjamin E. Smith and Henry C. Lord, do hereby grant and convey to the said Smith and Lord and their assigns, and to the survivor of them, his heirs and assigns, the said section of railroad and its appurtenances and all the income and earnings thereof, to hold the same in trust to secure the lien aforesaid pursuant, to the agreement aforesaid, but for no other purpose.

In testimony whereof the said Indianapolis, Cincinnati & Lafayette R. R. Co., by W. W. Smith, their vice-president, and the said White Water Valley R. R. Co., by Henry C. Lord, its president, have caused their respective signatures and corporate seals and the signatures of their respective secretaries to be annexed, and the said Benjamin E.

Smith and Henry C. Lord have also affixed their signatures and seals the day and year aforesaid.

THE INDIANAPOLIS, CINCINNATI AND LAFAYETTE RAILROAD COMPANY,
By W. W. SMITH, *Vice-President.*

Attest:
——— ———, *Secretary.*
[White Water Valley Railroad Co. Seal.]

THE WHITE WATER VALLEY RAILROAD COMPANY,
By H. C. LORD, *President.*

Attest:
I. CHAPMAN, *Secretary.*

B. E. SMITH. [SEAL.]
H. C. LORD. [SEAL.]

Signed, sealed, and delivered in the presence of us—
W. T. BOAZ.
JNO. H. FARQUHAR.

42 STATE OF OHIO, }
Hamilton County, } *ss:*

Before W. T. Boaz, a notary public within and for the county aforesaid, came The Indianapolis, Cincinnati and Lafayette R. R. Co., by W. W. Smith, their vice president, and The White Water Valley R. R. Co., by Henry C. Lord, their president, and acknowle-ged the within instrument to be the act and deed of their respective companies.

In testimony whereof I have hereunto set my hand and notarial seal this 10th day of July, 1869.

W. T. BOAZ,
Notary Public.

43 And afterwards, to wit, at the November term of said court, on the 5th day of January, A. D. 1874, in recess of said court, the following further proceedings in the above-entitled cause were had, to wit:

This cause came on for hearing upon the motion of Juliet T. Wright, Nathaniel Wright, Sr., Mary T. W. Curwen, Louisa W. Stephenson, Wm. Burnet Wright, and Samuel J. Broadwell to be made parties defendant in the above-entitled cause, with leave to file answer and cross-bill, and for reasons appearing to the court said motion is granted; and now come the said Juliet T. Wright, by her next friend, D. Thew Wright; Nathaniel Wright, Sr., Mary T. W. Curwen, Louisa W. Stephenson, by her next friend, R. H. Stephenson; William Burnet Wright, and Samuel J. Broadwell and waive the issuing of process and file their answer and cross-bill accordingly in the words following, to wit:

(This answer & cross-bill not on file; withdrawn June 11, 1874.)

And at the same time comes the defendant, The White Water Valley Railroad Company, and files answer herein in the words following, to wit:

The Answer of The White Water Valley Railroad Company, One of the Above-Named Defendants, to the Bill of Complaint of the Above-Named Plaintiffs.

In answer to the said bill the said defendant says as follows:

44 1. It admits that in the year 1869 it was duly organized, under the laws of Indiana, with full authority to locate, construct, and operate a line of railway from Hagerstown, in Wayne county, Indiana, to the town of Harrison, in Dearborn county, in the same State, on the boundary line between the States of Indiana and Ohio, and that thereafter the said line of railway was partially constructed and in operation—that is to say, from the town of Cambridge City continuously to the town of Harrison aforesaid; and that on said date this defendant made the contract, which is Exhibit A to the bill and to which this defendant asks leave to refer on the hearing of this case, with its codefendant, the said Indianapolis, Cincinnati and Lafayette Railroad Company, wherein it was recited that this defendant was without equipment and without the means to purchase the same or to fully complete the said line of railway as originally contemplated, and had placed its said codefendant in possession of said railroad, and whereby, in consideration of certain guarantees theretofore made and the covenants and payments to be thereafter performed and made by its co-
45 defendant, the said codefendant agreed to fully equip, maintain, and operate the said line of railway from Harrison to Hagerstown for the period, upon the conditions, and for the uses in the said contract set forth.

2. Said defendant admits that it was further agreed in and by said contract that its codefendant should, at its own expense, proceed to finish and put in good and safe running order, for the accommodation of the public, that part of the said line of railway then uncompleted—that is to say, that part between Hagerstown and Cambridge City, a distance of about eight miles.

3. But, further answering, this defendant denies that by said contract it was agreed that in the construction of the said portion its codefendant might adopt any reasonable plan and upon such completion be entitled perpetually to the entire income, profits, and earnings of the same. It says that by the terms of said contract said Indianapolis, Cincinnati and Lafayette Railroad Company covenanted, among other things, to pay to it for said railway from Harrison to Cambridge City the annual sum of one hundred and forty thousand dollars, and it was further agreed in said contract that in case said last-named company completed said portion between Cambridge City and Hagerstown, as aforesaid, then,
46 and in that case no further compensation was to be paid by it to this defendant on account of said portion, but that it

should be entitled to use all the profits, income, and earnings of the same perpetually.

It further says that it was agreed in said contract that the said Indianapolis, Cincinnati and Lafayette Railroad Company might adopt any reasonable plan and employ any suitable persons it might deem proper for the construction of said portion, and that the parties constructing the same should have the right to use the name and corporate powers of this defendant in any proper manner in constructing the road, procuring the right of way, or for any other proper purposes, the said Indianapolis, Cincinnati and Lafayette Railroad Company, however, agreeing to indemnify this defendant against all claims for damages growing out of any act or omission in the course of said construction.

4. This defendant admits the making of the contract of December 7th, 1867, by the I., C. & L. R. R. Co., Exhibit B to the bill, for the purpose stated, with B. E. Smith and H. C. Lord, plaintiffs herein,
for the construction of the line from Hagerstown to Cam-
47 bridge City, and the consideration therefor, as stated in the bill, and that said road was completed and said certificates issued.

5. This defendant denies that it ratified the lien set up in the bill or that it directed its president, under its corporate seal, to execute or join in any instrument of writing necessary or proper to effectuate the agreement between its codefendant and said Smith and Lord for such lien.

6. It admits that a paper writing, a copy of which, Exhibit F, is filed with and made part of the bill, was signed by W. W. Smith, as vice-president of its codefendant, and by the said H. C. Lord, as president of this defendant's company, and that on the 10th day of July, 1869, the said Smith and Lord, in their official character, appeared before one W. T. Boaz, claiming to be a notary public within and for the county of Hamilton, Ohio, and acknowledged said paper writing to be the act and deed of the said corporations.

7. But, further answering, this defendant denies that said instrument was ever delivered or that it had any legal validity, or that by the laws of equity it is bound thereby. It says that at and before the time of the making of the contract of Dec. 7, 1867, and
during all the times stated in the bill subsequent thereto and
48 in this paragraph the said Henry C. Lord was the president of this defendant's company and of its codefendant's and also of the Cincinnati and Indiana Railroad Company.

That the said Benjamin E. Smith, during all the times aforesaid, was the president of the Chicago and Great Eastern Railway Company and the Columbus and Indiana Central Railway Company. As hereinbefore stated, under the contract for a perpetual running arrangement or lease of the 4th of November, 1867, Exhibit A to the bill, the said Indianapolis, Cincinnati and Lafayette Railroad Company was in possession and operating this defendant's completed road from Harrison to Cambridge City, and by the terms of the same lease had the right to complete the remaining portion of its road from Cambridge City to Hagerstown, and, in consideration thereof, to run the same without addition to the rent reserved,

namely, $140,000. The purpose and object of the contract of December 7th, 1867, Exhibit B to the bill, was, as stated in the bill, to enable said Indianapolis, Cincinnati and Lafayette Railroad Company to perform its covenants under said agreement or lease of November 4th, 1867, and in order to open and maintain a con-
49 necting line of railroad at Hagerstown with the Columbus, Chicago and Indiana Central Railroad and interchange business with the last-named line in accordance with an agreement dated on the 14th of November, 1867, a copy of which is herewith filed and made part hereof, marked Exhibit A, between the Columbus and Indiana Central Railway Company and the Chicago and Great Eastern Railway Company, parties of the first part, and the Cincinnati and Indiana Railroad Company, the Indiana, Cincinnati and Lafayette Railroad Company, and this defendant, The White Water Valley Railroad Company, parties of the second part, for the interchange of business between said parties over their lines of road, respectively, between Cincinnati, Chicago, and Indianapolis and intermediate points for twenty years after the consolidation of the parties of the first part should be perfected as provided in said contract, Exhibit A hereto.

And the defendant says that it never received any consideration for entering into said last-named agreement except the covenants, guarantees, and agreements for payment contained in the agree-
50 ment or lease of Nov. 4th, 1867, and that the agreement contained in the paper writing or memorandum of agreement, Exhibit F to the bill, that the holders of said certificates should have a perpetual lien on said section of railroad from Cambridge City to Hagerstown and all income and earnings thereof to secure said certificates and the stipulated annual interest thereon, and on default of payment should have the right to take possession and hold the same till payment was received, was without consideration and void in law and equity, and that the said agreement was a device of the said Smith and Lord to cheat and defraud this defendant and its stockholders and to make them liable for the obligations of said Indianapolis, Cincinnati and Lafayette Railroad Company; and the defendant says, that in order to more effectually carry out said device and fraud, said Smith and Lord unlawfully combined and confederated with said William W. Smith and William O. Rockwood and John H. Farquhar, all of whom were directors of this defendant's company, as well as of its codefendants, and knew the facts hereinbefore stated, and caused a resolution to be entered on this defendant's minutes ten days after said acknowledgement before said
51 Boaz, to wit, on the 12th day of July, A. D. 1869, in which was recited the resolution of codefendant's company of the 23rd day of April, 1868, and resolving that defendant's company assent and approve of the said resolution of its codefendant and authorizing the said Lord to join in an instrument granting and securing said lien; and the defendant says that said resolution was never made known or assented to by its stockholders.

8. The defendant admits that it was agreed by and between it and its codefendant that said original contract of November 4th, 1867,

should be cancelled, but it says that said agreement was not made on or about the first day of May, 1871, but on the 26th day of January, A. D. 1871, and was executed in duplicate on or about said last-mentioned day under the corporate seals of said companies, respectively, and then delivered; that by the terms of said deed of cancellation, a copy of which is herewith filed, marked Exhibit "B," and made part hereof, the said Indianapolis, Cincinnati and Lafayette Railroad Company was to operate this defendant's road and keep the same in good repair until the first day of May, 1871, when the said road was to be delivered up to this defendant.

9. But this defendant denies that said deed of cancellation
52 was entered into with a full knowledge of all and singular the agreements and matters set forth in the bill, except as herein admitted, or that the same was without consideration, or that it was distinctly agreed in writing or otherwise between said company that this defendant should, as a part consideration for the surrender to it of said railroad from Hagerstown to Cambridge City, recognize as a just lien the claim of the holders of said certificates, or that it would pay the interest thereupon perpetually or make other satisfactory arrangement, or, failing therein, would surrender to the said Indianapolis, Cincinnati and Lafayette Railroad Company the possession of said section of railroad from Hagerstown to Cambridge City and cease to operate the same or receive the earning thereof.

10. Further answering, this defendant says that at the date of said deed of cancellation said Indianapolis, Cincinnati and Lafayette Railroad Company was insolvent and in danger of being proceeded against as a bankrupt; that one cause of its insolvency was improvident contracts like that entered into with this defendant, whereby it took upon its the operation and management of other lines than its own, which contracts were also of doubtful validity in
53 law; that the condition of said company's affairs and the duty of the defendant to the public made it for their common advantage that said agreement of Nov. 4th, 1867, should be cancelled.

That accordingly, in consideration of this defendant's releasing its codefendant from its covenants and guarantees in said agreement of Nov. 4, 1867, and agreeing to save harmless from said guarantees, the said codefendants gave up all its right, title, and interest of every name and nature in law and equity to this defendant's railroad, but agreed, as hereinbefore stated, to operate the same until the first day of May, 1871.

11. The defendant admits that since said last-mentioned date it has been in possession of said railroad from Hagerstown to Cambridge City, and has operated it in connection with the other part of its line, and has received the revenue and earnings thereof, and claims the same for its sole use and benefit, but it denies that the said revenue and earnings amount to $100,000, and says that taken seperately its earnings have not paid the cost of running and keeping it in repair.

12. Further answering, the defendant says that the actual cost of constructing said section of road between Hagerstown and Cam-

bridge City did not exceed over and above the donations re-
54 ceived by said Smith and Lord the sum of $100,000, and that no part of this sum was advanced by them or their associates, but came out of the moneys of the companies of which they were respectively the presidents.

13. And this defendant submits that all and every of the matters in said plaintiffs' bill mentioned and complained of are matters with respect to which said plaintiffs are not entitled to any relief from a court of equity, and asks that it may have the same benefit of this defence as if it had demurred to the said plaintiffs' bill.

14. Saving as herein admitted, the defendant denies all the other allegations of the said plaintiffs' bill, and prays to be hence dismissed with its costs.

[SEAL.] WHITE WATER VALLEY R. R. CO.,
By D. A. DWIGHT, *President.*

E. A. FERGUSON,
HARRISON & HINES, &
A. G. & G. T. PORTER,
Solicitors and Counsel for Defendants.

UNITED STATES OF AMERICA, }
Southern District of Ohio, } *ss:*

Personally appeared before me Daniel A. Dwight, —, being duly sworn, says that he is president of the White Water Valley Railroad Company, defendant herein; that the statements of the foregoing answer, so far as made of his own knowledge, are true, and so far as made upon the information of others he believes the same to be true.

D. A. DWIGHT.

55 Subscribed in my presence and sworn to before me this 3rd day of January, A. D. 1874.

[SEAL.] F. HOLLIDAY,
United States Commissioner, S. D. Ohio.

EXHIBIT "A" to Answer of Def't, W. W. V. R. R. Co.

Whereas negotiations are pending between the Columbus and Indiana Central Railway Company and the Chicago and Great Eastern Railway Company, corporations respectively under the laws of Ohio, Indiana, and Illinois *is* for the consolidation of their respective companies into one corporation, to be styled the "Columbus, Chicago and Western Central Railway Company," the said parties, in anticipation of their said consolidation, as parties of the first part, hereby enter into this contract with the Cincinnati and Indiana, the Indianapolis, Cincinnati and Lafayette, and the White Water Valley Railroad Company, corporations respectively organized under the laws of Ohio and Indiana, parties of the second part, witnesseth:

That for the purpose and object of enhancing the value of their

respective properties and of adding to the traffic and business between Cincinnati and Chicago and of increasing and perfect-
56 ing their facilities for transporting passengers and freight and of benefitting shippers and promoting the commerce of the cities and country tributary to these said roads between Cincinnati and Chicago the said parties of the first and second parts have agreed as follows, to wit:

1st. The said parties of the first and second parts hereby agree and contract to form a line of connecting roads for the transportation of freight and passengers between the cities of Cincinnati and Chicago and all intermediate points by the way of the Cincinnati and Indiana and the White Water Valley railroads to Hagerstown or New Castle and the present Chicago and Great Eastern railway, the said line to be operated as one through route between Cincinnati and Chicago without change of cars, upon mutual time-tables for all through trains, each party hereto providing adequate motive power for the prompt and efficient transaction of the joint business on its own part of said lines, and each to furnish its *pro rata* proportion of freight and passenger cars, according to the distance between Cincinnati and Chicago, adequate to the joint service, and each to keep its own road in good repair.

2nd. The party of the second part agrees to furnish all necessary and convenient yard room, depot grounds, and accommoda-
57 tions in the city of Cincinnati for the receipt, delivery, and handling of all passengers and freights and for the sale of tickets, and the said parties of the first part agree to furnish similar and adequate grounds, facilities, and accommodations in the city of Chicago, and neither party shall permit its passenger, express, or freight cars to run over any other route or line from Cincinnati to Chicago or from Chicago to Cincinnati than the one herein provided for, nor permit the passenger or freight cars of any other railroad company to run its line or any portion thereof when employed in transacting or competing for the joint business contemplated and provided for in this contract, and that the parties to this contract shall sell no tickets to Chicago or Cincinnati or intervening points except by this line unless otherwise specially requested by the purchaser, and shall bill and ship all freight destined for Chicago or Cincinnati or intermediate points over this line, unless otherwise specially marked or ordered by the shipper.

All business, whether passengers or freight, from Cincinnati to Chicago and points north and west therefrom and from Chicago and points north and west therefrom to Cincinnati which has hitherto been done by the said Chicago and Great Eastern Railway Company by way of Richmond or by the party of the second
58 part by the way of Indianapolis or Lafayette and Michigan City shall hereafter be done and transacted, in so far as the same can be influenced or controlled by the parties hereto, over the through route specified *are* provided in this agreement.

All business, both passenger and freight, between Cincinnati and points on the line of the roads running west of Logansport to Peoria and Warsaw and all points north thereof, in so far as the same

can be influenced or controlled by the parties hereto, shall be done over the line provided for in this agreement.

4th. A joint through tariff of rates of freight and passengers shall be agreed upon by the parties hereto, but the same may be modified and changed at any time by their respective presidents or superintendents to meet competition or wherever in their judgement the interest of the through line shall require such change or modification.

All through freights shall be billed from points of shipment to points of destination, and the form of manifests and the time and mode of settlement of such business between the parties hereto shall be regulated from time to time by their respective superintendent, or general freight agents.

59 Freight or merchandise lost or damaged while in transit shall be paid for by the part- on whose road the loss or damage accurred, but when such loss or damage cannot be located it shall be paid and prorated by the whole line between Chicago and Cincinnati.

5th. A joint local freight and passenger tarff between Cincinnati and Chicago and intermediate points and points west of Logansport shall be agreed upon, but the same may be modified or changed by the respective superintendents or general officers of the parties hereto when such change shall be required by the joint interest or profit.

6th. All through rates or fares shall be prorated according to distance, but each party shall be allowed to charge its local tariff on business to or from intermediate stations excepting in cases where rates are given in competition with other lines of transportation, when the rates shall be prorated.

7th. Each party shall be at the expense of printing its own tickets, but the cost of joint advertisements, posters, agents or employees, and baggage checks shall be prorated according to length of line.

8th. Settlements of all joint freight and ticket accounts and
60 balances, including car service, shall be made monthly, the latter at the following rates: Passenger cars, 3c.; express and baggage cars, 2c.; freight cars, 1c. per mile; but no mileage shall be charged for sleeping cars.

9th. All passenger and freight traffic between Cincinnati and local points on the line of the Columbus and Indiana Central road west of and including Richmond shall, in so far as the same can be controlled or influenced by the parties of the first and second parts, be done by the way of the White Water Valley and Cincinnati and Indiana roads.

For all such business a joint tariff shall be agreed on, which may be modified from time to time as competition *as* the interests of the parties hereto may demand.

The rates of passengers and freight between Indianapolis and Cincinnati shall be fixed by the party of the second part; but all the through traffic between Indianapolis and parts beyond and Cincinnati which the parties of the first part may from time to time control or handle shall, in so far as its rate can be controlled by said

parties, be billed and forwarded by way of the White Water Valley and Cincinnati and Indiana road-, and the through rate shall be prorated by the roads of the first and second parties, according to distance.

61 10th. Through time-tables between Cincinnati and Chicago for all trains requisite for the business of the through line shall be agreed upon by the superintendents of the respective roads, parties hereto, and shall be changed from time to time as the business of the line shall require, but it is hereby agreed that there shall be a morning and evening passenger train from Chicago to Cincinnati and from Cincinnati to Chicago, the time of the arrival and departure of said trains to be fixed so far as best to accommodate and develop their joint through business, and at the same time to accommodate, as near as possible, the time of the eastern trains of said parties of the first part to and from Logansport.

And the party of the second part further agrees that it will at no time discriminate in its tariff of rates for passengers or freight or the management of its business in favor of its route to Cincinnati or in favor of routes running east of Cincinnati against the route of the party of the first part via Richmond from points on the White Water Valley road.

11th. There being no legal impediment thereto, this contract shall go into effect on the final consolidation of the said companies,
62 parties of the first part hereto, and shall continue in force for the term of twenty years thereafter.

In testimony whereof the parties to these presents have caused the same to be signed by their respective presidents and their corporate seals to be hereto affixed this fourteenth day of November, 1867.

[SEAL.] COLUMBUS AND INDIANA CENTRAL RAILWAY CO.,
By BENJAMIN E. SMITH, *Pres't.*

[SEAL.] CHICAGO AND GREAT EASTERN RAILWAY CO.,
By W. D. JUDSON, *Vice Pres't.*

[SEAL.] INDIANAPOLIS, CINCINNATI AND LAFAYETTE RAILROAD CO.,
By H. C. LORD, *Pres't.*

[SEAL.] CINCINNATI AND INDIANA RAILROAD CO.,
By H. C. LORD, *Pres't.*

[SEAL.] WHITE WATER VALLEY RAILROAD CO.,
By H. C. LORD, *Pres't.*

EXHIBIT "B" to Answer of Def't, W. W. V. R. R. Co.

Cancellation of Lease.

This agreement, made this 26th day of January, A. D. 1871,
63 by and between the Indianapolis, Cincinnati and Lafayette Railroad Company, party of the first part, and the White

Water Valley Railroad Company, party of the second part, witnesseth:

That whereas the said parties, on the 4th day of November, A. D. 1867, entered into and executed a lease of the White Water Valley railroad, then and now belonging to and owned by the party of the second part and extending from the town of Harrison, in the county of Hamilton and State of Ohio, to the city of Cambridge, in the State of Indiana, to the party of the first part, and then and there gave possession of the same to the said lessee, which possession it still retains; and

Whereas the party of the first part is in the hands of receivers and threatened with bankruptcy, and there is danger of legal proceedings contesting the before-mentioned lease: Now, therefore, to avoid these dangers, which are regarded as ruinous to both parties, and to enable the party of the first part to avoid bankruptcy and the party of the second part to regain possession of its railroad and to procure rolling stock, the said parties have mutually agreed to cancel said lease and all the covenants therein contained.

Now, in consideration of the premises, it is hereby agreed that said lease be, and the same is hereby, cancelled.

64 And the said party of the first part does hereby grant, quitclaim, and convey to said party of the second part all its right, title, and interest of every name and nature in law and equity to said White Water Valley railroad, to have and to hold the said railroad and its appurtenances forever, and also does hereby release and discharge the said party of the second part from all claims and demands in law or equity which it has, if any, against said party of the second part.

And the said party of the first part does hereby agree until the first day of May next to operate in a proper and efficient manner the said railroad under the superintendence of an agent to be appointed by the party of the second part, and to be paid out of the earnings of said road a reasonable compensation.

The party of the first part agrees to furnish all the necessary assistance and equipment to do the business of said road, keeping said road in as good condition and repair as it now is, and, at the expiration of said period, to deliver peaceable possession of the same to said party of the second part.

65 That up to the said first day of May it will keep an accurate account of the receipts and expenditures of operating and keeping said road in repair, and will then pay the net profit to the treasurer of the party of the second part.

And at the expiration of said time, if demanded by the party of the second part, twenty days before said expiration the party of the first part will furnish all rolling stock necessary for operating said road for a reasonable compensation, to be agreed upon by the parties hereto or decided by referee, as hereinafter provided, until the first day of October next.

The said party of the first part further agrees that on demand it will make an arrangement with the party of the second part for bringing the business, freight, and passengers coming over its said road and

hauling its cars to and from Cincinnati, which arrangement shall be fair and equitable between the parties hereto; and if they cannot agree upon the details of said arrangement by the first day of April next, then said details shall be left to be made by three referees, one to be selected by each party and the third by these two, who shall report a contract of arrangement, which shall be accepted and binding by and upon both parties.

66 The cancellation of the lease as aforesaid shall in nowise affect the right of the party of the second part to the unpaid rent which shall be due and in arrear on said lease on the first day of February next, provided that the said party of the second part hereby agrees to accept in payment of said rent in arrear bonds of said party of the first part, secured by a new mortgage of its property and franchise, in case the same shall be made, at the rate of ninety cents on the dollar, provided said party of the first part hereby agrees to accept the the bonds aforesaid at seventy-five cents on the dollar in payment of any dues between the parties for the use of rolling stock, and at par for any profits that shall accrue after the aforesaid running arrangement is concluded from the joint business on the road of the party of the first part.

The party of the second part agrees to hold and save harmless the said party of the first part from all liability to pay any of the coupons as well as the principal of the bonds secured by mortgage heretofore issued by the party of the second part and claimed to be guaranteed by the party of the first part, and to pay the same

67 as they respectively mature; and in case the party of the first part should be compelled by reason of said guaranty—liability on which, however, it is understood is disputed by the party of the first part—to pay any of said coupons, then the party of the first part agrees that it will not before January 1st, 1873, commence proceedings to foreclose the said mortgage or collect said coupons:

Provided, That any coupons of bonds issued by the party of the second part as aforesaid which shall come into the possession of the party of the first part, other than by said party being obliged to pay them by decree of court, shall be funded in bonds bearing such rate of interest and upon such time as the holders of a majority of the bonds issued as aforesaid by said party of the second part may agree.

The party of the first part agrees to pay all taxes now due and unpaid on said railroad.

Nothing in this agreement shall in anywise affect the rights and the interests of parties interested in the Harrison Branch railroad.

And if said Harrison Branch railroad shall come into possession of the party of the second part or other assignee of the Har-

68 rison Branch Company, then and in that case a new running arrangement, in manner hereinbefore provided, shall be made between the parties hereto for bringing the business of the party of the second part and of the assignees of the Harrison Branch Company from Valley Junction to Cincinnati and from Cincinnati to Valley Junction.

In testimony whereof the said Indianapolis, Cincinnati and La-

fayette Railroad Company, by its president, M. E. Ingalls, and A. Worth, its secretary, and the White Water Valley Railroad Company, by its president, William Dwight, and its secretary, Jonathan Chapman, have caused their respective corporate seals to be hereunto affixed in duplicate on the day and year first above mentioned.

WHITE WATER VALLEY RAILROAD COMPANY,
[SEAL.] By WILLIAM DWIGHT, *President.*

Attest: A. WORTH,
Sec'y I., C. & L. R. R. Co.

INDIANAPOLIS, CINCINNATI AND LAFAYETTE RAILROAD COMPANY,
[SEAL.] By M. E. INGALLS, *President.*

Attest: JNO. CHAPMAN,
Sec'y W. W. V. R. R. Co.

69 And afterwards, to wit, at the November term of said court on the 2d day of March, A. D. 1874, in recess of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, The Indianapolis, Cincinnati and Lafayette Railroad Company, by Messrs. Baker, Hord, and Hendricks, its solicitors, and enters its appearance herein.

And at the same time comes the defendant, The White Water Valley Railroad Company, by Messrs. Harrison and Hines and Messrs. Albert G. and George T. Porter, its solicitors, and files its motion in writing to dismiss the cross-bill of Broadwell and others in the words following, to wit:

The White Water Valley Railroad Company, one of the defendants in the above-named suit, now comes and moves the court to dismiss the cross-bill exhibited and filed in said suit by Samuel J. Broadwell, Nathaniel Wright, Sr., William Burnet, Mary T. W. Curwen, Juliet F. Wright, and Louisa W. Stephenson, for the following reasons, to wit:

1. That none of the complainants in said cross-bill are parties defendant to the original bill exhibited and filed in said cause.

2. That the only party to said cross-bill that is a party to the original bill is Samuel J. Broadwell, who is a complainant in said original bill, and is therefore not a proper party complainant in said cross-bill.

3. That whatever relief is sought competent to be granted under the averments contained in said cross-bill, if any, may be granted under said original bill.

HARRISON & HINES,
A. G. & G. T. PORTER,
Sol's for W. W. V. R. R. Co.

70 And afterwards, to wit, at the May term of said court, on the 21st day of May, A. D. 1874, before the Honorable David

Davis, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, The Indianapolis, Cincinnati and Lafayette Railroad Company, by Messrs. Baker, Hord, and Hendricks, its solicitors, and files its answer, with exhibits thereto attached, in the words following, to wit:

The said Indianapolis, Cincinnati and Lafayette Railroad Company, by its solicitors in this behalf, saving all exceptions, &c., for its separate answer to the bill of complaint, or so much thereof as it is advised is material to be answered, answering, says:

It admits the organization of its said codefendant as a corporation, with the powers and for the purposes stated in said bill.

It admits that said agreement between it and its said codefendant, a copy of which is exhibited and filed with said bill of complaint, marked "Exhibit A," was in fact entered into and executed in the names of said two corporations and under the sanction of their respective board- of directors and officers.

71 Respondent admits that its directors, officers, and agents did in fact enter into possession of the road and property of said codefendant under color of said agreement, and did continue to hold, use, and occupy the same in the manner and for the period stated in said bill.

It further admits that while in such possession and in furtherance of the object of the intent and agreement aforesaid its said officers and agents, under the sanction of its said board of directors, did in fact in its name enter into, on said 7th day of December, 1876, *enter into* said contract with said Benjamin E. Smith and Henry E. Lord for the building of an extension of said railroad of its codefendant from Cambridge City to Hagerstown, in Wayne county. It supposes "Exhibit B," filed with the complaint, to be a true copy of said contract. It admits that said Smith and Lord constructed and completed said Hagerstown Extension under and pursuant to said contract; that possession was taken of said Hagerstown Extension when so constructed in the name of this respondent and held as under said first-named agreement.

It also admits that during the progress of the construction of said extension and after its completion its said officers, under the sanction

72 of its said board of directors, did, in its name and under its corporate seal, execute and deliver to said Lord and Smith, and to such other persons as they did designate and appoint, obligations to the aggregate amount of 205,000 dollars, divided into shares of 100 dollars each, purporting to be transferable on respondent's books like shares, the principal being irredeemable, but bearing a perpetual interest at the rate of 8 per cent. per annum, payable semi-annually, as stated in said bill.

Repondent further admits that while its said then directors, officers, and agents were so in possession of said road and property of said codefendant and operating the same under color of said first-named agreement, and claiming a perpetual leasehold interest therein, and while the construction of said Hagerstown Extension was in progress, to wit, on or about said 28th day of April, 1868,

it was agreed by and between its said directors and officers in its name and the holders of said interest obligations that the said holders of said obligations should have a perpetual lien upon said income and earnings of said Hagerstown Extension to secure the payment of said semi-annual instalments of interest.

Respondent admits that its said codefendant afterwards ratified said contract and said lien, and that afterwards a mortgage was executed to secure the same, as stated in said bill of com-
73 plaint and as shown by "Exhibit F," therewith filed.

Respondent is not advised and therefore cannot answer as to who are now or were at the time of filing said bill the holders or owners of said interest obligations.

It is true, as stated in said bill, that all the said instalments of interest that fell due on and prior to said 1st day of June, 1870, were paid to the respective holders of said interest obligations by the treasurer of this defendant and out of its moneys, and that no subsequent instalment has been paid by it.

Respondent avers that the sums so paid out of its treasury in satisfaction of said instalments falling due on and prior to June 1st, 1870, greatly exceed all the net earnings of said Hagerstown Extension that ever came into its possession.

Respondent further avers that it is and at the date of the agreement herein first above mentioned was a corporation subsisting under the laws of said State of Indiana, and by its charter and the laws of said State authorized to own and operate a railroad extending from the city of Lafayette, in the county of Tippecanoe, to a point in Dearborn county, on the Ohio State line east of and near to the city of Lawrenceburgh, in said last-named county.

74 That its said codefendant in and at the date of said agreement was a corporation subsisting under the laws of said State and authorized by its charter and the laws of said State to own and operate a railroad from the town of Cambridge City, in Wayne county, to the town of Harrison, in said Dearborn county.

That nothing in the respective charters of said two corporations or in any law of said State authorized said two companies to construct, own, or operate their railroads to any common point of intersection on the State line or elsewhere, and that they were wholly distinct and independent railroad corporations; that the point of nearest approach between their said roads authorized by their charters is at their said respective southeastern termini, and which are distinct from each other over five miles.

Respondent is advised by counsel that the agreement first aforesaid entered into by its directors, officers, and agents in its name for the leasing of the railroad and property of said White Water Valley Railroad Company, and also the second aforesaid contract for the building of said Hagerstown Extension, and also the said obligations executed as by it and in its name for the perpetual payment of interest on said 205,000 dollars as and for the cost of the construction of said Hagerstown Extension were and are all and each out-
75 side and beyond any corporate power vested in it by law and wholly unauthorized and void.

Respondent shows that afterwards, to wit, on the 25th day of October, 1870, having become greatly embarrassed financially, and being wholly unable to meet and pay its debts as they became due, and being in imminent danger of insolvency and bankruptcy, its railroads and all its property and franchises were, by the judgement of the Marion civil circuit court, in a certain cause wherein Antrim B. Forsythe and others were plaintiffs and this respondent was defendant, placed in the hands of receivers, which cause was afterwards, pursuant to the act of Congress in such — made and provided, removed into this court.

Respondent says that afterwards, to wit, on the 26th day of January, 1871, with the assent and concurrence of the receivers in said cause, under the order and sanction of said Marion civil circuit court, it entered into an agreement in writing with said codefendant, a copy of which is filed herewith, marked "Exhibit No. 1," whereby it was agreed in substance and effect that the said railroad and property of said codefendant, as mentioned in the agreement first aforesaid, should be surrendered to said codefendant, and that
76 said agreement first hereinbefore mentioned, in so far as it granted a lease of said codefendant's railroad and appurtenances from said Cambridge City to Harrison, should be cancelled.

That in and by said last-named agreement no provision was made respecting said Hagerstown Extension or the payment of the instalments due and to fall due upon said interest obligations, and that — were then a subsisting lien upon said Hagerstown Extension as aforesaid.

Respondent says that said extension comprised eight miles of railroad; that it was essential to the completeness of the line of said codefendant's road, without which it would enjoy no railroad connection at its northwestern terminus.

That between the times of the execution of said first and last above named contracts said extension had been constructed by said Smith and Lord under the second above mentioned contract; that said codefendant had invested no money whatever in the construction of the same, and did not at the time of entering into said contract of January 26th, 1871, pretended to have any legal or equitable right to take possession of and use said Hagerstown Extension without consideration and freed of the said subsisting lien thereon;
77 but, on the contrary thereof, it was then and there fully understood and agreed that said codefendants should take said Hagerstown Extension subject to the payment of said interest obligations and save this respondent harmless from the demands of said scrip holders in respect thereof or make other such equitable adjustment as might thereafter be agreed upon.

Respondent shows that the aforesaid understanding had at the date of said agreement of January 26, 1871, is manifested by a certain other agreement in writing, dated April 25th, 1871, entered into between it and said codefendant and other parties with the concurrence of said receiver, under the order and sanction of said court, a copy of which is filed herewith, marked "Exhibit No. 2," by which

last-mentioned agreement it is provided, among other things, in substance and effect as follows, viz:

That if said scripholders would agree to accept 6,150 dollars in full satisfaction of said annual interest, being at the rate of three per centum instead of eight per centum per annum, said codefendant would assume and pay the same, and it was therein further provided that in case said scripholders would not agree to receive payment at said rate said codefendant would convey said Hagerstown Extension to this respondent.

78 And, as further evidence of said agreement and understanding, this respondent says that afterwards, to wit, in the month of ——, 1871, said codefendant did notify this defendant in writing that if said scripholders should not soon agree to accept said three per centum per annum in full satisfaction said codefendant would convey and make over said Hagerstown Extension to respondent.

Respondent says that at the time of the surrendering of said White Water Valley railroad and appurtenances, from Cambridge City to Harrison, in accordance with said agreement of January 26th, 1871, it did also yield to said codefendant the possession of said Hagerstown Extension, subject to the aforesaid understanding respecting future adjustment.

That said White Water Valley Railroad Company has ever since possessed, used, and enjoyed the same.

That it has wholly failed to pay any portion of the cost of constructing said extension, and has wholly failed to pay any moneys due to the holders of said interest scrip, and that it inequitably claims to own the same as its own property free and discharged of said lien or of any obligations or liability in respect thereof.

This respondent prays the judgement of the court if it is liable *in personam* upon said interest obligations and if the

79 said interest obligations and if the said Hagerstown Extension should not be subjected to the payment and satisfaction thereof.

And, having fully answered, this defendant prays to be hence dismissed with its reasonable costs.

[SEAL.] THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD COMPANY,
By M. E. INGALLS, *President.*

BAKER, HORD & HENDRICKS, *Solicitors.*

EXHIBIT No. 1.

This agreement, made this 26th day of January, A. D. 1871, by and between the Indianapolis, Cincinnati and Lafayette Railroad Company, party of the first part, and the White Water Valley Railroad Company, party of the second part, witnesseth:

That whereas the said parties on the 4th day of November, A. D. 1867, entered into and executed a lease of the White Water Valley Railroad Company, then and now belonging to and owned by the party of the second part, and extending from the town of Harrison, in the county of Hamilton and State of Ohio, to Cambridge City, in

the State of Indiana, to the party of the first part, and then and there gave possession of the same to the said lessee, which possession it still retains; and whereas the party of the first part is in the hands of receivers and threatened with bankruptcy, and there is danger of legal proceedings contesting the before-mentioned lease:

Now, therefore, to avoid these dangers, which are regarded as ruinous to both parties, and to enable the party of the first part to avoid bankruptcy and the party of the second part to regain possession of its railroad and to procure rolling stock, the said parties have mutually agreed to cancel said lease and all the covenants therein contained.

Now, in consideration of the premises, it is hereby agreed that said lease be, and the same is hereby, cancelled, and the said party of the first part does hereby grant, quitclaim, and convey to the said party of the second part all its right, title, and interest of every name and nature in law and equity to said White Water Valley railroad; to have and to hold the said railroad and its appurtenances forever; and also does hereby release and discharge the said party of the second party from all claims and demands in law or equity which it has, if any, against said party of the second part.

And the said party of the first part does hereby agree until the first week in May next to operate in proper and efficient manner said railroad under the superintendence of an agent, to be appointed by the party of the second part and to be paid out of the earnings of said road a reasonable compensation.

The party of the first part agrees to furnish all the necessary assistance and equipment to do the business of said road, keeping said road in as good condition and repair as it now is, and at the expiration of said period to deliver peaceable possession of the same to said party of the second part.

That up to said first day of May it will keep an accurate account of the receipts and expenditures of operating and keeping said road in repair, and will then pay the net profit to the treasurer of the party of the second part; and at the expiration of said time, if demanded by the party of the second part twenty days before said expiration, the party of the first part will furnish all rolling stock necessary for operating said road, for a reasonable compensation, to be agreed upon by the parties hereto or decided by referees, as hereinafter provided, until the first day of October next.

The said party of the first part further agrees that on demand it will make an arrangement with the party of the second part for bringing the business, freight, and passengers coming over its said road and hauling its cars to and from Cincinnati, which arrangement shall be fair and equitable between the parties hereto, and if they cannot agree upon the details of said arrangement by the first day of April next, then said details shall be left to be made by three referees, one to be selected by each party and the third by those two, who shall report a contract of arrangement, which shall be accepted and binding by and upon both parties.

The cancellation of the lease as aforesaid shall in nowise affect the right of the party of the second part to the unpaid rent which shall be due and in arrears on said lease on the first day of February next:

Provided, That the said party of the second part hereby agrees to accept in payment of said rent in arrear bonds of said party of the first part secured by a new mortgage of its property and franchise, in case the same shall be made at the rate of ninety cents on the dollar, provided said party of the first — hereby agrees to accept the bonds aforesaid at seventy-five cents on the dollar in payment of any dues between the parties for the use of rolling stock and at par for any profit that shall accrue after the aforesaid running arrangement is concluded from the joint business on the road of the party of the first part.

The party of the second part agrees to hold and save harm-
83 less the said party of the first part from all liabilities to pay any of the coupons, as well as the principal, of the bonds secured by mortgage heretofore issued by the party of the second part and claimed to be guaranteed by the party of the first part, and to pay the same as they respectively mature; and in case the party of the first part should be compelled by reason of said guaranty liability, which, however, it is understood is disputed by the party of the first — to pay any of said coupons, then the party of the first part agrees that it will not before January 1st, 1873, commence proceedings to foreclose the said mortgage or collect said coupons: Provided, That any coupons of bonds used by the party of the second part as aforesaid which shall come into the possession of the party of the first part other than by said party being obliged to pay them by decree of court shall be funded in bonds bearing such rate of interest and upon such time as the holders of a majority of the bonds issued as aforesaid by said party of the second part may agree.

The party of the first part agrees to pay all taxes now due and unpaid on said railroad. Nothing in this agreement shall in anywise affect the rights and interests of parties interested in the Har-
84 rison Branch railroad, and if said Harrison Branch railroad shall come into possession of the party of the second — or other assignee of the Harrison Branch Company, then and in that case a new running arrangement, in manner hereinbefore provided, shall be made between the parties hereto for bringing the business of the party of the second part and of the assignees of the Harrison Branch Company from Valley Junction to Cincinnati and from Cincinnati to Valley Junction.

In testimony whereof the Indianapolis, Cincinnati and Lafayette Railroad Company, by its president, M. E. Ingalls, and A. Worth, its secretary, and the White Water Valley railroad, by its president, William Dwight, and its secretary, Jonathan Chapman, have caused

their respective corporate seals to be hereunto affixed in duplicate on the day and year first above mentioned.

WHITE WATER VALLEY RAILROAD COMPANY,
By WILLIAM DWIGHT, *President.*
INDIANAPOLIS, CINCINNATI & LAFAYETTE R. R. CO.,
By M. E. INGALLS, *President.*

Attest: JONATHAN CHAPMAN,
Secretary W. W. V. R. R. Co.

85 EXHIBIT No. 2.

Memorandum of agreement, made this 25th April, A. D. 1871, between the Cincinnati and Indiana Railroad Company, of the first part, the Indianapolis, Cincinnati and Lafayette Railroad Company, of the second part, the White Water Valley Railroad Company, of the third part, and the Harrison Branch Company, of the fourth part, witnesseth:

That to effect a compromise of the controversy now pending between said first and second parties on one part and said fourth party on the other part in the suit No. 36199, in the common pleas of Hamilton county, Ohio, and to form a perpetual connection and running arrangement between all said parties it is mutually agreed as follows:

1. Said fourth party shall immediately become incorporated by taking proper measures for that end under the general railroad laws of Ohio.

2. Immediately thereupon the said first party shall convey and set over to the fourth party so incorporated all the said Harrison Branch railroad and all rights, privileges, and appurtenances appertaining to it as the assignees of Dwight and Lord under the contract between said first party and Dwight and Lord, made on the 21st July, 1863; to have and to hold the same to said fourth party
86 so incorporated, their successors and assigns, forever.

3. Immediately upon the execution of said conveyance and transfer said fourth party shall lease the said Harrison Branch to the third party for the term of ninety-nine years, renewable forever, reserving a yearly rent of sixteen thousand dollars ($16,000), being eight per cent. per annum upon the entire capital of said fourth party, and to be paid semi-annually from and after May 1st, A. D. 1871, at Cincinnati, to the stockholders therein, in which lease, besides payment of said rent or dividend and of all taxes and duties levied or assessed upon said Harrison Branch railroad or upon the capital stock of said fourth party, the said third party shall also be bound at all times to keep said Harrison Branch railroad thoroughly renewed and repaired and to suffer no waste or deterioration, and also on behalf of said fourth party to perform and keep up the connection and running arrangement hereinafter provided and to indemnify said fourth party against any and all damage or liability whatsoever in respect to the operating of said railroad, with an express condition

that if said third party fail to pay or perform either of said stipulations, then in any such case it shall be lawful for said fourth party, their successors or assigns, subject to and keeping the running
87 arrangement herein provided, to re-enter and take possession of said Harrison Branch and every part and appurtenance thereof, and to have and take all the earnings therefrom and apply the same to fulfill and secure all and every the stipulations and conditions of such lease, which lease shall continue, nevertheless, in full force and obligation against said third party, notwithstanding such temporary dispossession and such dispossession shall continue until said third party makes full amends for any such default, or said fourth party, their successors and assigns, may for any such violation wholly forfeit said lease, first giving thirty days' previous notice.

4. The said second party shall ratify and confirm said conveyance by the first party to the fourth and lease by the fourth to the third.

5. The second party operating their own and the railroad of the first party, and the third party intending to operate their own and the railroad of the fourth party so to be conveyed and leased, shall and will enter into an arrangement for operating said two lines in connection, so that all the business of said third and fourth parties into and out of Cincinnati shall be run over the railroad of said first and second parties upon such terms as said second and third
88 parties from time to time shall agree, or if at any time they disagree, thereupon such terms as shall be settled by disinterested referees experienced in operating railroads, one to be chosen by the second party, one by the third party, and the third or umpire by the two so chosen, and the determination of them or any two of them in writing shall be conclusive.

6. In consideration of the release by the third and fourth parties of all claims and demands whatsoever upon the first and second parties or either of them to the 1st May, A. D. 1871, the said second party hereby sell, assign, and set over to the third party all the chattels and supplies of every sort on the line of the roads of said third and fourth parties, a schedule of which has been exhibited and is now in the hands of Moore, the superintendent of the I., C. & L. railroad, and to be produced for reference; also all claims of said second party against a certain hydraulic company on the line of the White Water Valley railroad for excavations, hauling, and services done for said hydraulic company, with full power to sue and recover the same; said second party to do all such further or other acts, but at the sole expense of said third party, as are necessary to enable said third party to recover and collect
89 the same; and also to supply said third party until the first of August next, without charge, all the rolling stock necessary and proper to enable said third party to do all the business over the roads of said third and fourth parties, and to keep said rolling stock fully repaired against ordinary wear and tear, but not against any extraordinary injuries occasioned by accident or fault of said third party, and said second party shall also pay said third party upon the completion of this agreement on its part ten

thousand dollars, $10,000, in cash, which shall be a full and final settlement of all claims or demands as well of the said third and fourth parties, on the one part, as of said first and second parties, on the other; and the said fourth party, in consideration of the said dividend of eight per cent. per annum, to be guaranteed and secured to their stockholders by said third party, and of the other stipulations to be expressed in said lease, relinquish to said third party all the chattels, supplies, claims against the hydraulic company, and cash so agreed to be delivered and paid to them by the second party.

7. The second party shall execute to the third party a lease for ninety-nine years, renewable forever, of their branch, extending from Cambridge to Hagerstown, in Indiana, known as the
90 Hagerstown Branch, for which a rent of six thousand one hundred and fifty dollars, or three per cent. upon the certificates of the Hagerstown Association, shall be paid to the stockholders therein at Cincinnati if they will accept said rental, but in case said association refuses to accept it in full of the outstanding certificates, then said third party shall release and reconvey said railroad to the second party.

8. The said second party shall secure the concurrence of the receivers and the approval of the courts in Indiana and Ohio to the foregoing articles by application in the suits now pending, and these articles shall thereupon be carried out and executed by each of the parties without delay.

9. The second party shall pay said third party two thousand dollars in cash for the deficiency in the quantity of firewood stated in the schedule mentioned instead of replacing such quantity.

THE CINCINNATI & INDIANA AND
THE INDIANAPOLIS, CINCINNATI &
LAFAYETTE RAILROAD COMPANY,
By GEO. HOADLEY, *Att'y.*
CHAPMAN DWIGHT,
Sup't & Agent W. W. V. Co.
RUFUS KING, *Att'y for Same.*
THE HARRISON BRANCH CO.
91 Per A. W. HENDRICKS,
Att'y as per Authority Annexed.

CINCINNATI, 1 *May*, '71.

A. W. Hendricks, att'y.

Sign the general agreement on behalf of Harrison Branch Company.

(S—) JONATHAN CHAPMAN, *Gen. Ag't.*
RUFUS KING, *Att'y.*
WM. DWIGHT.

And at the same time come also the complainants, by Messrs. McDonald and Butler, their solicitors, and file their notice of application for the appointment of a receiver herein, in the words following, to wit:

The defendant, The White Water Valley Railroad Company, will take notice that on Monday, the 25th day of May, A. D. 1874, or as soon thereafter as the same can be heard, a motion will be made on the part of the complainants, for the benefit of the parties interested, for the appointment of a receiver for so much of the line of the road of the said defendants as extends from Cambridge City to Hagerstown, and particularly described in the said bill of complaint.

May 20, 1874.

McDONALD & BUTLER,
Atty's for Broadwell and Wright, Complainants.

We acknowledge service of the above notice this 20th day of May, 1874.

PORTER, HARRISON & HINES,
For W. W. V. R. R. Co.

92 And afterwards, to wit, at the May term of said court, on the 8th day of June, A. D. 1874, before the Honorable David Davis, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Now comes the Indianapolis Rolling Mill, by H. Crawford, its solicitor, and, upon its application in writing in the words following—

United States Circuit Court, District of Indiana.

WILLIAM D. THOMPSON *et al.* *against* THE WHITE WATER VALLEY RAILROAD COMPANY and Others.	Chancery.	3311.

The petition of the Indianapolis Rolling Mill respectfully shows that it is a corporation duly organized under the laws of the State of Indiana, and that it is and was, at the time of the institution of this action, the owner and holder of 135 of the shares specified in the bill of complaint herein, and as such holder is entitled to a lien upon the said line of railroad and its earnings to the amount of $13,500 and interest; for which reasons your petitioner prays that it may be admitted as a party plaintiff herein upon the record, and that, being so admitted, *that* all and singular the relief prayed for by the said original bill may be granted by the court.

INDIANAPOLIS ROLLING MILL,
By H. CRAWFORD, *Its Solicitor.*

93 —it is ordered that the said The Indianapolis Rolling Mill be admitted a party complainant to the bill herein.

And now, at the same time, come Samuel J. Broadwell, Nathaniel Wright, Senior, William Burnet Wright, Mary F. W. Curwen, Juliet T. Wright, and Louisa W. Stephenson, by D. Thew Wright, their solicitor, and, upon their motion, it is ordered that the said several parties last named be admitted parties complainant to the bill here

United States Circuit Court, District of Indiana.

WILLIAM D. THOMPSON and Others
against
THE WHITE WATER VALLEY RAILROAD COMPANY and Others.

The petition of Samuel J. Broadwell, Nathaniel Wright, Sr., William Burnet Wright, Mary T. W. Curwen, Juliet F. Wright, a married woman, by her next friend, D. Thew Wright; Louisa W. Stephenson, by her next friend, R. H. Stephenson, respectfully shows that they are and were at the time of filing of the original bill in this cause owners and holders of said Hagerstown certificates as follows:

	Samuel J. Broadwell, one hundred & thirty-one	$13,100
	Nath. Wright, sixty-five	6,500
	Wm. Burnet Wright, fifty	5,000
	Mary T. W. Curwen, eighty-five	8,500
94	Juliet T. Wright, one hundred & sixty-five	16,500
	Louisa W. Stephenson, fifty	5,000

That as such holders they are entitled to a lien upon the said line of railroad and its earnings to the extent of the amounts above respectfully set forth with interest. Thereupon your petitioners pray that they may be admitted as parties plaintiff herein upon the record, and that being so admitted that all and singular the relief prayed for by the said original bill may be granted by the court.

D. THEW WRIGHT,
Solicitor for said Petitioners.

95 And afterwards, to wit, at the May term of said court, on the 11th day of June, A. D. 1874, before the Honorable David Davis, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

This cause came on to be heard upon the motion of the plaintiffs for the appointment of a receiver *pendant- lite*, which motion the court, having heard and considered, now overrules.

It is by consent further ordered that the said White Water Valley Railroad Company keep a correct and accurate account of the earnings of the said section of road between Cambridge City and Hagerstown.

And the plaintiff now files his replication to answers of the defendants herein in the words following, to wit:

WILLIAM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY and Another.

Come now the complainants and, for replication to the answers filed by the several defendants herein and to each of them, say that the said bill is certain and sufficient and the said answers and

each of them are untrue, uncertain, and insufficient to bar the said complainants of the relief prayed in their said bill. Wherefore they pray for relief therein prayed, &c.

McDONDALD & BUTLER,
Att'ys for Comp't.

The answer and cross-petition of Broadwell and others, filed January 5th, 1874, by leave of the court is withdrawn.

96 And afterwards, to wit, at the May term of said court, on the 25th day of August, A. D. 1874, before the Honorable Samuel H. Treat, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by H. Crawford, Esq., their solicitor, and file their replication herein in the words following, to wit:

Circuit Court of the United States for the District of Indiana. In Chancery.

WILLIAM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY R. R. CO. *et al.*

These replicants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this replicant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which

97 matters and things these replicants are and will be ready to *avoid* and prove as this honorable court shall direct, and humbly pray as in and by their said — they have already prayed.

HENRY CRAWFORD,
Solicitor for Complainants.

And afterwards, to wit, at the November term of said court, on the 3rd day of December, A. D. 1874, before the Honorable Thomas Drummond, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, The White Water Valley Railroad Company, by Mess. Harrison, Hines, and Miller, its solicitors, and files its motion to strike from the files the deposition of Mr. Prentiss in the words following, to wit:

STATE OF OHIO, }
Hamilton County, } *ss:*

Nicholas Longworth makes oath and says that he is one of the attorneys of the White Water Valley Railroad Company, and that

as such attorney he was served, on or about the 3rd of October, 1874, with a copy of a notice to take depositions in the case of Thompson *et al. vs.* White Water Valley R. R. Co. *et al.*, pending in the circuit court of the United States for the district of Indiana,
98 at the office of D. T. Wright, Esq., in Cincinnati, on Wednesday, October 7th, 1874, which notice was signed by Henry Crawford and D. Thew Wright, as attorneys for the plaintiff in said action; that said notice was served upon him by Herman Brashear, Esq., the United States commissioner before whom said depositions were to be taken, and that he accepted service thereof.

Affiant says that he was informed at the time that it was intended to take the deposition of Mr. Prentiss, secretary of the said White Water Valley R. R. Co., to prove the authenticity of certain records of the proceedings of the directors and stockholders of said company in his possession.

Affiant says that at the time aforesaid he was informed by said Brashear that it might not be possible to take the depositions at the time aforesaid, and that he agreed with said Brashear and afterwards with said Crawford and Wright that said depositions might be taken at any time which would suit the convenience of all the parties, said plaintiffs' counsel to notify affiant when they should be ready to proceed, the depositions not to be closed without giving affiant an opportunity to cross-examine. Affiant cannot say with certainty whether he was informed by said attorneys in so many words
99 that the only testimony desired from Mr. Prentiss was to authenticate the said records, but he is sure that he asked said Crawford and Wright what they expected to prove by said deposition, and was answered that they expected to prove said records, and that from what they said affiant received the impression that the testimony was to be confined to this point.

Affiant told said attorneys that it would be unnecessary to subpœna said Prentiss; that he would direct him to be present and to bring his books.

Affiant says that the first notice received by him of the taking of said deposition was on Thursday, October 8th; that he attended at said Wright's office immediately on receiving said notice, and then learned for the first time that on the morning of that day said Wright and Crawford had examined said Prentiss touching the receipts and expenditures, the indebtedness of and claims upon the said White Water Valley R. R. Co.; that thereupon affiant charged that said proceeding was an unfair attempt to obtain information, not pertinent to said action, for use against its interest in other affairs than the suit in question, and protested against it.

Affiant further says that although said Brashear, U. S. commissioner as aforesaid, was present during the taking of the
100 testimony that neither the questions nor the answers of the witness were taken down by him nor reduced to writing by him nor by any person in his presence, but notes were taken in short-hand by a reporter who was present in characters unintelligible to the witness and to this affiant. Affiant says that he objected and protested against said proceedings and insisted that said depositions

should be taken in the regular and legal way, but his protest and objections were disregarded.

Affiant says that he did not know who said reporter was nor anything of him, further than that he had on a previous occasion been employed by the I., C. & L. R. R. in a case against said W. W. V. R. R.

Affiant says that said report was not read over to said witness nor subscribed by him, and that affiant does not know whether said short-hand notes are a true report of the testimony of said Prentiss, and believes that they are not.

N. LONGWORTH.

Sworn to before me and subscribed in my presence this 12th day of October, A. D. 1874.

[SEAL.] DWIGHT W. HUNTINGTON,
Notary Public for Hamilton County, Ohio.

101 WILLIAM D. THOMPSON & Others
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY. } In Chancery. No. 3311.

The White Water Valley Railroad Company moves the court to suppress and strike from the files the paper on the files of the court in this case purporting to be the deposition of —— Prentiss and taken by the complainants in this case for the following objections:

That neither the answers given by the witness nor the questions propounded to him were taken down by the commissioner before whom the pretended deposition appears to have been taken nor reduced to writing by said commissioner nor by any person in his presence; that the pretended deposition was not read over to or signed by the said witness, and that the same was not regularly taken and was taken in the manner in which it was taken, as appears from the affidavit of N. Longworth, filed with and made a part and ground of this motion, without the consent and against the protest of the said defendants or the counsel of said defendants.

HARRISON & HINES,
Solicitors for said Defendant.

102 And at the same time said railroad company, by said solicitors, also files its motion to amend its answer herein and deposits said amendment.

And said motion is in the words following, to wit:

In the Circuit Court of the United States for the District of Indiana.
In Chancery.

WILLIAM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY and Others. } No. 3311.

Daniel A. Dwight, being duly sworn, on his oath says that he is the president of the White Water Valley Railroad Company, one of

the defendants in the above-entitled cause; that the amendment proposed to be made by leave of court to the answer of said defendants to the bill of complaint contains matters of importance to the defense in said cause, and that the same were overlooked by inadvent*ure* of affiant and of his counsel in the preparation of said answer, and that he believes the same to be material to the interests of said defendants in said cause, and that the matters contained in said amendment he believes to be true.

D. A. DWIGHT.

Subscribed Feb. 5th, 1875.

J. D. HOWLAND, *Clerk.*

103 In the Circuit Court of the United States, District of Indiana. In Chancery.

WILLIAM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY *et al.* } No. 3311.

The said defendant, The White Water Valley Railroad Company, respectfully moves the court for leave to file an amendment to the answer of said company, in substance denying that any mortgage upon the road of said company or any part thereof made reference to in the complainants' bill of complaint was ever at any time executed under proper authority by the Indianapolis, Cincinnati and Lafayette Railroad Company.

This defendant bases the said motion upon the ground that the said denial was inadvertently omitted in the preparation of said answer.

HARRISON & HINES,
Solicitors for said Def't.

In the Circuit Court of the United States, District of Indiana. In Chancery.

WILLIAM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY *et al.* } No. 3311.

104 Amendments to the answer of the White Water Valley Railroad Company to the complainants' bill of complaint.

The said defendants, The White Water Valley Railroad Company, by leave of court, amends *her* said answer to the complainants' bill of complaint, and for such amendment says that *she* denies that any mortgage upon the road of said company or any part thereof made reference to in the complainants' bill of complaint was ever at any time executed under the proper authority by the Indianapolis, Cincinnati and Lafayette Railroad Company.

HARRISON & HINES,
Solicitors for said Defendant.

UNITED STATES OF AMERICA, *District of Indiana:*

Daniel A. Dwight, being duly sworn, on his oath says that he has carefully read over the foregoing amendments to the answer of the White Water Valley Railroad Company to the complainants' bill of complaint in said cause; that he is the president of said company and authorized to act in this behalf, and that the matters and things stated in the said amendment to said answer are true in substance and in fact.

DAN'L A. DWIGHT.

105 And afterwards, to wit, at the November term of said court, on the 8th day of November, A. D. 1875, before the Honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by their solicitors, and file their amendments to their answer herein in the words following, to wit:

(Amendment not on file.)

And upon their motion the complainants are ruled to reply herein by the 15th day of November inst.

And afterwards, to wit, at the November term of said court, on the 13th day of April, A. D. 1878, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to-wit:

Come now the complainants, by D. Thew Wright, their solicitor, and by leave of court file their amended bill herein in the words following, to wit:

Amended Bill.

Circuit Court of the United States, District of Indiana. Chancery.

WILLIAM D. THOMPSON, SAM'L J. BROADWELL, D. THEW WRIGHT, and Nathaniel Wright, Ex'r of the Estate of Nathaniel Wright, Dec'd; Wm. Burnet Wright, Mary T. W. Curwen, Juliet T. Wright, by Her Next Friend, &c., D. Thew Wright, and Louisa Stephenson, by Her Next Friend, and R. A. Stephenson, *et al.*

against

106 THE INDIANAPOLIS, CINCINNATI & LAFAYETTE R. R. Co. and THE WHITE WATER VALLEY R. R. Co.

And now come the said Sam'l J. Broadwell, D. Thew Wright, and Nathaniel Wright, exec'r, &c.; Nathaniel Wright, Wm. Burnet Wright, Mary T. W. Curwen, Juliet T. Wright, by her next friend, D. Thew Wright, and Louisa W. Stephenson, by her next friend, R. H. Stephenson, and file this their amended bill of complaint, leave of this honorable court being first had and obtained.

Aver-ing, as heretofore, the various matters and things in said original bill, they ask judgment and decree against said defendants for the amounts due them as holders of said Hagerstown scrip, being four per cent. on the amount of said scrip held by them, due each Dec'r and June the first, commencing Dec. 1st, 1870, with in-

terest thereon, and such other and further relief as to the court may seem just.

D. THEW WRIGHT.

And afterwards, to wit, at the November term of said court, on the 13th day of November, A. D. 1878, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by counsel, and by leave of
107 court file their supplemental bill herein in the words following, to wit:

Supplemental Bill.

In the Circuit Court of the United States, District of Indiana.

WILLIAM THOMPSON, JULIET F. WRIGHT, by Her Next Friend, D. Thew Wright; Louisa W. Stephenson, by Her Next Friend, R. H. Stephenson; Mary T. W. Curwen, William Burnet Wright, Samuel J. Broadwell, D. Thew Wright, Executor of the Last Will, &c., of Nathaniel Wright, Deceased; D. Thew Wright and Samuel J. Broadwell, Trustees, &c.,

against

THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD COMPANY, The White Water Valley Railroad Company, M. E. Ingalls, Receiver of the I., C. & L. R. R. Co.; The Cincinnati and Indianapolis Railroad Company, and M. E. Ingalls, Receiver of the Same; —— Parkman, Receiver of the White Valley R. R. Co., and ——.

And now come your said orators, Juliet F. Wright, by her next friend, D. Thew Wright; Louisa W. Stephenson, by her next friend, R. H. Stevenson; Mary T. W. Curwen, William Burnet Wright Samuel J. Broadwell, D. Thew Wright, and Samuel J. Broad-
108 well, executors of the last will and testament of Nathaniel Wright, deceased, and Samuel J. Broadwell and D. Thew Wright, trustees, as well for themselves as for all others of like interest who are waiting to come in and contribute to the cost and expense of these proceeding, and aver as follows, saying, as in the original bill, that they are holders of said Hagerstown scrip to the amounts heretofore set out in the proceedings in this cause, and that they are interested in said Hagerstown Branch or Extension and in the rails, ties, switches, road-bed, and all the appurtenances to said branch or extension belonging; that they own the same or have a lien thereon to the extent of the amount of such scrip by them respectively held; and they further say they are advised that certain proceedings have been had in this court, to which none of your orators were made party, to foreclose a mortgage upon the White Water Valley railroad, and that said road has been sold under the order of this court and has been purchased by James I. Storrow, William H. Rollins, Henry Parkman, Joseph I. Emery, and Charles W. Short, a committee acting for themselves and others; that such purchasers claim to have purchased under said sale said Hagerstown Branch or Extension and now claim to hold and own the

same in utter disregard of the rights of your orators and other owners of said Hagerstown scrip, and said purchasers
109 purpose to take up and remove out of the jurisdiction of this court all the iron, rails, ties, and other valuable parts of said branch or extension and sell the same for their own benefit and totally abandon for the future said branch or extension and all use thereof, all of which is destructive of the rights and interests of your orators and to their irreparable injury. Your orators therefore pray that the said Indianapolis, Cincinnati and Lafayette Railroad Company, the Cincinnati and Indiana Railroad Company, M. E. Ingalls receiver of said companies; The White Water Valley Railroad Company, Henry Parkman, receiver of said White Water Valley Railroad Company; James I. Starrow. William H. Rollins, Henry Parkman, Joseph I. Emery, and Charles W. Short may be made parties to this supplemental bill, and that a writ of subpœna may issue to them, and also a writ of injunction, forbidding them, and especially the said James I. Starrow, William H. Rollins, Henry Parkman, Joseph I. Emery, and Charles W. Short, or any or either of them, from taking up the iron or other material of said road, branch, or extension or selling the same or any of it or in any manner, way, shape, or form interfering therewith; and that upon final hearing said injunction may be made perpetual, and the relief, originally and by amended bill, be granted with such other or fur-
110 ther relief, or both, as the court may deem meet.

D. THEW WRIGHT,
SAM'L R. MATTHEWS,
Sol's for Compl'ts.

MATTHEWS, RAMSEY AND MATTHEWS,
Of Counsel.

D. Thew Wright, being duly sworn, says that the matters and things in the foregoing bill stated, so far as stated of his own knowledge, are true; so far as stated on information and belief he believes them to be true.

D. THEW WRIGHT.

Signed in my presence and sworn to before me this 25th day of July, A. D. 1878.

[SEAL.] WILLIAM M. TREVOR,
Notary Public in and for Hamilton County, Ohio.

And afterwards, to wit, at the November term of said court, on the 22nd day of November, A. D. 1878, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

And now come the said parties, and the said Henry Parkman appears to the motion for an injunction and in open court, representing James S. Starrow, Wm. H. Rollins, Joseph J. Emery, & Chas. W. Short, who, together with himself, are the "purchasing committee," & stipulates that the iron, material, & other works upon the

seven miles of railroad described in the bill shall not be dis-
111 turbed, but remain as they are, until the case is disposed of on final hearing.

And afterwards, to wit, at the November term of said court, on the 9th day of January, A. D. 1879, before the Honorable Thomas Drummond and the Honorable Walter Q. Gresham, judges as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now defendants Parkman and Short, by Messrs. Harrison, Hines, and Miller, their solicitors, and enter their appearance herein.

And afterwards, to wit, at the November term of said court, on the 27th day of January, A. D. 1879, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Receiver Henry Parkman and files his plea to supplemental bill herein in the words following, to wit:

The plea of Henry Parkman, receiver of the White Water Valley R. R. Co., to the supplemental bill of complaint of William D. Thompson *et al.*

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged
112 to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea thereunto saith that on the 12th day of November, 1875, he was appointed receiver of said railroad company by this honorable court in a suit wherein Jas. J. Starrow *et al.* were plaintiffs and The White Water Valley R. R. Co. *et al.* were defendants; that afterwards by a decree in said cause said railroad was sold by the special master, William P. Fishback, Esq., appointed by this court on the 2nd day of May, 1878, and that said sale was ratified and confirmed by this court; all of which matters, decrees, and orders will more fully and at large appear by reference to the records of said case remaining in this court, to which this defendant begs leave to refer; that afterwards a new corporation, by the name of The White Water R. R. Co., was formed under the laws of the State of Indiana by the purchasers at said sale, the certificate whereof was filed with the Secretary of State for the State of Indiana on the 27th day of May, 1878, and that this defendant, receiver as aforesaid, delivered possession of said railroad to said White Water Railroad Company, and he has not been in possession of said railroad nor in receipt of the rents and profits thereby since that time, which was long before the time of filing of this supplemental bill.

113 All of which matters and things this defendant avers and pleads in bar to the supplemental bill of complaint, and prays the judgment of this honorable court whether he should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in that behalf most wrongfully sustained.

HENRY PARKMAN.

On this 4th day of January, 1878, before me personally appeared Henry Parkman and made oath that the above plea subscribed by him is true in point of fact, and that the same is not interposed for delay.

WILLIAM N. ORCUTT, [SEAL.]
Notary Public.

The Plea of Henry Parkman, One of the Defendants, to the Supplemental Bill of Complaint of William D. Thompson et al.

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea thereunto saith that by a decree of this honorable court in a cause wherein Jas. J. Starrow *et al.* were plaintiffs and The White Water Valley R. R. Co. *et al.* were the defendants a sale of said railroad for the purpose of foreclosing a mortgage thereon was made by the special master, William P. Fishback, appointed by this court on the 2nd day of May, 1878; that this defendant was one of a purchasing committee appointed by the bondholders of said railroad company for the purpose of protecting their rights, and that as one of such purchasing committee he bid off and bought said railroad at the sale thereof for the benefit of and in trust for such bondholders as chose to avail themselves of such purchase and to become members of a new corporation to be formed for the ownership and management of said railroad; that such sale was afterwards ratified and confirmed by this honorable court, but that this defendant nor any of the other members of said purchasing committee never received any deed of said property, and that shortly afterwards a corporation was organized under the laws of the State of Indiana, by the name of the White Water Railroad Company, the certificate whereof was filed in the office of the secretary of state for the State of Indiana on the 27th day of May, 1878; that said defendant as one of said purchasing committee, together with the other members of said committee, transferred all his interest and title in and to said railroad to said White Water Railroad Company before said supplemental bill was filed, and that this honorable court has adopted said transfer, and on the 29th day of November, 1878, by an order entered in said case of Storrow *et al. vs.* The White Water Valley R. R. Co. *et al.*, ordered that a deed should be made direct to the said new corporation, to wit, to the White Water R. R. Co.; all of which matters, decrees, and orders will more fully and at large appear by reference to the records of said case remaining in this court, to which the defendant begs leave to refer.

114

115

And this defendant further says that, as one of such purchasing committee as aforesaid, he has never been in actual possession of said railroad nor in the receipt of the rents and profits thereof, and that he has not since said sale by said master had any interest, legal or equitable, in said property other than as one of such purchasing committee as aforesaid.

And this defendant further says that, to the best of his knowledge and belief, none of the other members of said purchasing committee have been served with process in this cause or summoned to answer said supplemental bill.

And this defendant further says that the White Water R.
116 R. Co. since its organization has always been in possession of said railroad and in receipt of the rents and profits thereof, and is a proper party to be made defendant in this cause.

All of which said matters and things this defendant avers and pleads in bar to the supplemental bill of complaint, and prays the judgement of this honorable court whether he should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this case most wrongfully sustained.

HENRY PARKMAN.

On this 4th day of January, 1878, before me personally appeared Henry Parkman and made oath that the above plea subscribed by him is true in point of fact, and that the same is not interposed for delay.

[SEAL.] WILLIAM N. ORCUTT,
Notary Public.

And afterwards, to wit, at the May term of said court, on the 7th day of May, A. D. 1879, before the Honorable Walter Q. Gresham, judge as aforsaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

It appearing to the court that the White Water Railroad Company, a corporation under the laws of the State Indiana,
117 has an interest in this cause and in the property the subject-matter of the same, it is ordered that said The White Water Railroad Company be, and it is hereby, made a party defendant hereto, and that process, in due form of law, issue to bring it into court.

And now comes said White Water Railroad Company, by Harrison, Hines, & Miller, its solicitors and counsel herein, and waive the issuing and service of process herein, and is ruled to answer the bill, cross-bills, and supplemental bills filed herein within thirty days from the entry hereof.

And thereupon this cause is dismissed as to James J. Storrow, William H. Rollins, Henry Parkman, Joseph J. Emery, and Charles W. Short, and Henry Parkman, receiver, and the stipulation and order heretofore made herein that the track, &c., between Hagerstown and Cambridge City is to stand unaffected.

And afterwards, to wit, at the May term of said court, on the 19th day of June, A. D. 1879, in recess of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the White Water Railroad Company, by Messrs. Harrison, Hines, and Miller, its solicitors, and files its answer herein in the words following, to wit:

118 *The Answer of The White Water Railroad Company to the Bill of Complaint and the Supplemental Bill of Complaint of William D. Thompson, et al., Complainants.*

The said defendant, now and at all times reserving to herself any and all advantage of exception to the many errors, imperfections, and uncertainties of the said bill of complaint and of the said supplemental bill of complaint of the said complainants, for answer unto so much and such parts of the same as she is advised is or are material for her to answer unto says that she admits that the said White Water Valley Railroad Company was organized as a corporation in the year 1865 to construct and operate a railway from the town of Hagerstown in the county of Wayne, in the State of Indiana, to the town of Harrison, in the county of Dearborn, in said State, upon the boundary line between the States of Ohio and Indiana, and that, as alleged in the said original bill of complaint, the line of said road was in the month of November, 1867, partially constructed and in operation—that is to say, between the town of Cambridge City and said Harrison, but whether the said White Water Valley Railroad Company was then and there wholly without equipment or means to complete the same this defendant is not informed, except by the allegations of the said bill
119 of complaint and the provisions of the contract next hereafter named, and she therefore denies the same; but this defendant is informed and believes — to be true that on or about the 4th day of November, 1867, the said White Water Valley Railroad Company and the Indianapolis, Cincinnati and Lafayette Railroad Company entered into the written contract and agreement named in the complainants' bill of complaint as Exhibit A, and to which this defendant prays leave to refer as part of this answer, and she admits that it was in said contract recited that the said White Water Valley Railroad Company was without means to promptly complete the said road beyond Cambridge City—that is, between Cambridge City and Hagerstown aforesaid—and without resources to procure equipment therefor, and that in consideration of certain guarantees theretofore made and covenants and payments thereafter to be performed, the said Indianapolis, Cincinnati and Lafayette Railroad Company agreed to fully equip, maintain, and operate the whole of said White Water Valley Railroad Company's road between Harrison and Hagerstown for the time and uses in the said contract set forth, and that the said Indianapolis, Cincinnati & Lafayette Railroad Company should at its own expense proceed to finish and put in
120 good and safe running order the then uncompleted part of said line of railway, to wit, that portion of the same between Hagerstown and Cambridge City aforesaid, being about eight miles thereof.

But this defendant denies that by said contract it was agreed that in the construction of said unfinished portion of said railroad the said Indianapolis, Cincinnati and Lafayette Railroad Company might adopt any reasonable plan and upon the completion thereof be entitled perpetually to the entire income, profits, and earnings of

the same. But this defendant says that by the terms of said agreement said Indianapolis, Cincinnati and Lafayette Railroad Company covenanted, among other things, to pay to said White Water Valley Railroad Company, for the use of the railway from Harrison to Hagerstown and the use of the rights, privileges, and franchises of said last-named company on the whole line of its said road, the sum of $140,000.00 per year, including the said unfinished portion of said road from Cambridge City to Hagerstown, which by the terms of said contract was to be finished under the charter and in the name of said last-named company, and that in event the said unfinished portion of said railroad should be completed by said Indianapolis, Cincinnati & Lafayette Railroad Company as contemplated in said contract, then no further compensation should be paid to said
121 White Water Valley Railroad Company, said Indianapolis, Cincinnati and Lafayette Railroad Company agreeing, however, to indemnify said White Water Valley Railroad Company against any and all claims for damages growing out of any act or omission of said first-named company in the course of the construction thereof; and this defendant says that at the time of the execution of the said contract Henry C. Lord, one of the complainants in this cause, was the president of each of said companies and executed the same as the president of the White Water Valley Railroad Company and procured the execution of the same by said Indianapolis, Cincinnati and Lafayette Railroad Company, by W. W. Smith, vice-president thereof; T. A. Morris and L. B. Lewis, as a committee of said last-named company, and that, as this defendant is informed and believes, neither said contract nor the provisions thereof were ever submitted to the action of the stockholders of said White Water Valley Railroad Company nor acted upon by them.

And this defendant, further answering, says that she is informed and believes it to be true that the said Indianapolis, Cincinnati and Lafayette Railroad Company entered into the contract of December 7th, 1867, with Benjamin E. Smith and Henry C. Lord, who
122 are among the complainants in this cause, the said Henry C. Lord being at the same time the president of the said Indianapolis, Cincinnati and Lafayette Railroad Company, for the construction of that part of the said White Water Valley railroad which was then uncompleted between Cambridge City and Hagerstown aforesaid, and that under the provisions of said contract the said certificates therein named and provided for were issued.

And this defendant, further answering, says that she is informed and believes it to be true that on or about the 28th day of April, 1868, the agreement for a perpetual lien upon the said eight miles of road between Hagerstown and Cambridge City aforesaid was made between the said Lord and Smith and the said Indianapolis, Cincinnati and Lafayette Railroad Company; but this defendant denies that the White Water Valley Railroad Company ever ratified and confirmed the said contract and the said pretended lien set up in the said bill of complaint, or directed in any lawful way the president of the said last-named company to execute or join in any instrument of writing necessary or proper to effectuate any agree-

ment between the said Indianapolis, Cincinnati and Lafayette
123 Railroad Company and the said Smith and Lord for any such lien; and this defendant denies that any mortgage upon the said road lying between the said towns of Cambridge City and Hagerstown was ever at any time executed by the said Indianapolis, Cincinnati and Lafayette Railroad Company under any proper or lawful authority so as to be binding upon said White Water Valley Railroad Company as a corporation.

This defendant says that she is informed and believes it to be true, but does not know the same of her own knowledge, that the paper writing, a copy of which is Exhibit F, as filed with and made a part of the original bill in this cause, was signed by W. W. Smith as vice-president of said Indianapolis, Cincinnati and Lafayette Railroad Company, and by Henry C. Lord, who is one of the complainants in said bill of complaint, and that the said Smith and Lord, in such official capacity, on the 10th day of July, 1869, appeared before Wm. T. Boaz, a notary public in and for Hamilton county, Ohio, in said county and State, and acknowledged said paper writing to be the act and deed of said corporation; but this defendant is informed and believes, and therefore avers and charges, that the said instrument was never delivered, and that it never had any legal
124 validity, and that said White Water Valley Railroad Company or this defendant is not legally or equitably bound thereby. This defendant says that at and before the time of the making of said contract of December 7, 1867, and during all the time subsequent thereto, up to and including said 10th day of July, 1869, the said Lord was president of said White Water Valley Railroad Company and of said Indianapolis, Cincinnati and Lafayette Railroad Company, and of the Cincinnati and Indiana Railroad Company, and that the said Benjamin E. Smith was the president of the Chicago and Great Eastern Railway Company; that under the contract for a perpetual running arrangement or lease, of the 4th day of November, 1867, referred to in said bill of complaint, the said Indianapolis, Cincinnati and Lafayette Railroad Company was in possession of and operating said road as then completed from Harrison to Cambridge City, and had the right to complete the remaining portion of said road, between Cambridge City and Hagerstown, and, in consideration thereof, to run the same without addition to the rent reserved in said lease, to wit, the annual sum of $140,000, and, as this defendant is informed and believes and avers the fact to be that the object and purpose of the said contract of December 7th, 1867, was to enable said Indianapolis, Cincinnati and Lafayette Railroad
125 Company to perform its covenants and agreements contained in said contract of November 4th, 1867, and in order to operate and maintain a connecting line of railroad at Hagerstown with the Chicago and Great Eastern and the Columbus and Indiana Central railroad in accordance with an agreement dated November 14th, 1867, between the Columbus and Indiana Central Railway Company and the Chicago and Great Eastern Railway Company, of one part, and the Cincinnati and Indiana Railroad Company, the Indianapo-

lis, Cincinnati, and Lafayette Railroad Company, and the White Water Valley Railroad Company, for the interchange of business between said parties over their respective lines, between Cincinnati, Chicago, and Indianapolis and intermediate points, for twenty years after the consolidation of said Columbus and Indiana Central Railway Company and the Chicago and Great Eastern Railway Company should be perfected, as was then and there contemplated. This defendant says that she cannot furnish a copy of said contract, as she is not in possession of the same nor any copy thereof; and this defendant further says that the said White Water Valley Railroad Company never received any consideration for entering into said last-named agreement except the covenants and agree-
126 ments for payment of rents contained in said agreement of November 4th, 1869, and that the agreement contained in the paper writing, Exhibit F to said original bill of complaint, providing that the holders of said certificates should have a perpetual lien on said section of railroad between Cambridge City and Hagerstown and all income and earnings thereof to secure the same and the stipulated annual interest thereon, and on default of payment should have the right to take possession of and hold the same till payment should be made, was without consideration and void in law and equity, and that said agreement was a device of said Lord and said Benjamin E. Smith to defraud said White Water Valley Railroad Company and its stockholders and to make them liable for the obligations of said Indianapolis, Cincinnati and Lafayette Railroad Company; and this defendant is further informed and believes and avers the fact to be that, in order the more effectually to carry out said device, said Smith and Lord unlawfully combined and confederated with William W. Smith, William C. Rockwood, and John H. Farquhar, who were directors of said White Valley Railroad Company as well as of said Indianapolis, Cincinnati and Lafayette Railroad Company and knew all the facts aforesaid, and caused a resolution to be entered on the records of the board of directors
127 of said White Water Valley Railroad Company two days after the acknowledgement before said Boaz, to wit, on the 12th day of July, 1869, in which said Lord was authorized to join in an instrument granting and securing said lien; but this defendant avers that such resolution was never made known to or ratified by the stockholders of said White Water Valley Railroad Company.

This defendant further says that she believes the said contract of November 4th, 1867, was cancelled between said White Water Valley Railroad Company and Indianapolis, Cincinnati and Lafayette Railroad Company on or about January 26th, 1871, by an instrument in writing then executed, but that the said railroad from Harrison to Hagerstown was not by the terms thereof to be delivered to said White Water Valley Railroad Company until May 1, 1871, but this defendant is informed and believes, and therefore avers and charges the fact to be, that the said White Water Valley Railroad Company did not by such writing agree to recognize the lien of the holders of said Hagerstown certificates as a just lien upon said portion of railroad and surrender the same to said Indianapolis, Cincin-

nati and Lafayette Railroad Company in default of payment of interest thereon for the consideration of such surrender, but the defendant avers that in consequence of said Indianapolis, Cin-
128 cinnati and Lafayette Railroad Company being at that time insolvent and in great danger of having proceedings in bankruptcy instituted against her, and that the said cancellation was for the benefit of both parties thereto, and that the consideration to said Indianapolis, Cincinnati and Lafayette Railroad Company for the cancellation thereof was the surrender of the covenants and guarantees of said Indianapolis, Cincinnati and Lafayette Railroad Company to said White Water Valley Railroad Company in said agreement of November 4, 1867.

And this defendant avers that even if the consideration was as alleged and even if the said White Water Valley Railroad Company had in a lawful way recognized said lien as a just one for any consideration whatever and had lawfully and in a manner binding upon said corporation and the stockholders thereof, yet by reason of the facts hereinafter stated such obligation of said last-named company and the lien claimed as aforesaid would not be operative and binding in law or equity upon these defendants; and this defendant further says that she is informed and believes and avers the fact to be that the actual cost of constructing said eight miles of railroad between Cambridge City and Hagerstown did not exceed $100,000 beyond the amount of donations received by the said Smith and Lord to be applied to and given for that purpose, and that in fact no
129 part of said $100,000 was advanced by them or their said associates, but came out of the monies of the companies of which they were respectively the presidents. And this defendant, further answering, says that the said White Water Valley Railroad Company, under the terms of its organization as a corporation and by the provisions of its charter, was authorized to construct a railroad from Harrison aforesaid to Hagerstown aforesaid, being about the distance of sixty-five miles, and that a long time prior to the making of said contract of November 4, 1867, or any of the other contracts named in the said original bill of complaint, the said White Water Valley Railroad Company, as she lawfully might, resolved to issue her coupon bonds to the amount of $1,000,000, to bear interest at the rate of eight per cent. per annum, payable semi-annually, and to secure the payment of said bonds and the interest to become payable thereon by a mortgage of its railroad, its real estate, its franchises, its rights of way, and its property and privileges of every description, and that thereupon, to wit, upon or about the 1st day of August, 1865, the said White Water Valley Railroad Company did execute and deliver to William Dwight, Thomas Dwight, and Daniel Thew Wright, as trustees for whoever should be holders of such
130 bonds (the said Wright being one of the complainants in this suit), a deed of mortgage conveying to said trustees all the railroad of said last-named company, all the right of way and land occupied thereby, with the superstructure, and all property and materials, rights and privileges, then or thereafter appertaining to said company, and all the appurtenances, rights, franchises, and privi-

leges of said company, and all income, tolls, and profits of said road, the said deed of mortgage being to secure — the holders of said bonds and coupons thereto attached the payment thereof, and this defendant files herewith a copy of said deed of mortgage and prays that the same in all its parts may be taken as a part of this answer. And this defendant avers that the said trustees named in said mortgage accepted said trust and joined in the execution of said deed of mortgage, and thereafter, to wit, on the 3rd day of October, 1865, the execution of the same was duly acknowledged before a proper officer, and was recorded in the offices of the respective recorders of Dearborn, Franklin, Fayette, and Wayne counties, through which the said road was located, long before the execution of the said contract of November 4, 1867, to wit, by the 13th day of November, 1865, and became and was notice to all the world of the matters and things therein stated, and the said complainants, at the time they received the said certificates,
131 had full notice and knowledge thereof. And the defendant further says that the said White Water Valley Railroad Company issued and sold the said bonds provided for in the said deed of mortgage, to wit, on or before the first day of January, 1866, as these defendants are informed and believe, and — were, to the extent of about $950,000, outstanding on the 25th day of January, 1875, when certain of the holders of said bonds, to wit, James J. Storrow, Joseph S. Fay, Henry H. Fay, Sarah B. Fay, Sahal S. Fay, Henry Parkman, executor, and Joseph S. Fay, Jr., filed their original bill of complaint in this honorable court, making the White Water Valley Railroad Company, William Dwight, Daniel Thew Wright, Daniel A. Dwight, Chapman Dwight, William Dwight, Jr., and W. H. Hackett, —— Chapman defendants thereto, seeking the foreclosure of said mortgage for the payment of the said mortgage debt; whereupon, as prayed for in said bill, writs of subpœna were issued, under the seal of said court, and, the parties defendant being duly in court, such other and further proceedings were had that by decree of this honorable court the said mortgage was foreclosed and the rights, privileges, franchises, and property therein named were sold, and James J. Storrow, William H. Rollins, Henry Parkman, J. J. Emery, and Charles W. Short, as members of a committee of certain
132 holders of the bonds and coupons issued under said mortgage and upon the security thereof, and of such other holders of the same as should choose to contribute to the expenses and avail themselves of the right to become purchasers of the rights, franchises, and property named in said mortgage and to form a corporation, under the laws of the State of Indiana, for the ownership, management, and operation of the said mortgaged property so purchased, and especially the ownership, management, and operation of said road from Harrison to Hagerstown aforesaid, became the purchasers thereof, for the sum of $25,000, in trust, for the purposes aforesaid, and as such purchasers, long before this defendant was made a party defendant to this suit, held the said road, property, and franchises under said sale and assigned and transferred their rights thereunder to this defendant. And this defendant fur-

ther says that said sale was made by William P. Fishback, a master in chancery of this court, and conveyance thereunder was duly made and said sale was in all things confirmed, and this defendant thereunder, prior to her being made a defendant to this suit, became the owner and into the possession of the said mortgaged property; and the proceedings in said cause and said sale and the confirmation thereof will more fully and at large appear by reference to
133 the record in said cause now remaining in this court, to which this defendant craves leave to refer and read upon the hearing of this cause; and this defendant insists that, by virtue of such sale under the mortgage aforesaid and the transfer of said property and rights to this defendant, her rights to the said eight miles of road upon which the complainants claim to hold a lien are prior to and superior to any rights or lien of the said complainants as set up in their bill of complaint, the said bonds and coupons issued under said mortgage having been issued and sold by said White Water Valley Railroad Company for value long before the making of any of the said contracts set up in complainants' bill of complaint; and this defendant admits that of the said complainants only Daniel Thew Wright was made defendant to the said bill of complaint of James J. Starrow *et al.* aforesaid, and this defendant says said Wright did not answer the same, and that a decree in said cause was taken as confessed as to him, as this defendant is informed and believes.

And this defendant further insists that under the law and rules of equity the complainants can hold no lien, as claimed in said bill of complaint, upon or against any portion of the said railroad
134 or upon or against any parts or portions of the franchises of said last-named White Water Valley Railroad Company, and that there can be no division of the same or of said road.

And this defendant respectfully submits whether, even if the court should be of opinion that the complainants or any of them in this cause have any rights, interests, claims, or liens in or upon any portion of the road or franchises formerly the property of said White Water Valley Railroad Company, set forth in their said bill of complaint and supplemental bill, they have any other rights than such as are junior to the rights of this defendant, as aforesaid, or any right except as right of redemption, upon the payment of said mortgage debt represented by this defendant as the owner of said property and franchises under the sale aforesaid.

And this defendant denies that she is or has been threatening to take up any part or parcel of the iron rails, ties, or other valuable parts of said eight miles of railroad upon which said complainants claim a lien, as alleged in said supplemental bill of complaint.

And this defendant denies all and all manner of fraudulent or unlawful combination and confederacy with which she stands charged by said bill and supplemental bill of complaint, without this, that there is any other matter, cause, or thing in the said com-
135 plainants' bill and supplemental bill of complaint contained material or necessary for him to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, and denied, is not true to the knowledge or belief of

this defendant; all which matters and things this defendant is ready to aver, maintain, and prove as this honorable court shall direct, and she humbly prays to be hence dismissed with her reasonable costs.

[SEAL.] WHITE WATER RAILROAD CO.,
By ELIJAH SMITH, *President.*
Attest: HENRY PARKMAN, *Secretary.*

HARRISON, HINES & MILLER,
Solicitors for White Water Railroad Co.

UNITED STATES OF AMERICA, *District of Massachusetts:*

Elijah Smith, being duly sworn, on his oath says that he is president of the White Water Railroad Company named in the foregoing answer, and that he has carefully read over the same and knows the contents thereof, and that the same is true of his knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes the same to be true.

[SEAL.] ELIJAH SMITH.

STATE OF MASSACHUSETTS, *County of Suffolk,* } *ss:*

BOSTON, *June 14th*, 1879.

Sworn to before me this day.

HENRY BROOKS,
Notary Public.

136 And afterwards, to wit, at the May term of said court, on the 27th day of October, A. D. 1879, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Harrison, Hines and Miller, its solicitors, and files its motion to suppress depositions in the words following, to wit:

The defendant, The White Water Railroad Company, moves the court to suppress and reject the depositions of D. Thew Wright and M. E. Ingalls, which appear upon the files of said cause, for the following reasons:

1st. Said depositions were not taken by an examiner of the court, nor upon a commission upon interrogatories filed in the office of the clerk of this court, nor upon agreement of the parties upon oral interrogatories.

2nd. Said depositions were not taken in any manner or form provided by law or the equity rules of this court.

The defendant aforesaid further moves the court to suppress and reject the deposition of Henry C. Lord, which appears upon the files of said cause, for the reasons named above as to the depositions of D. Thew Wright and M. E. Ingalls.

The defendant aforesaid further moves the court to suppress the depositions of Henry Prentiss and S. J. Broadwell, which ap-

137 pear on the files of said cause, for the reasons named above as to the depositions of D. Thew Wright and M. E. Ingalls, and for the further reason that the same are not properly certified, and the certificate of the officer purporting to have taken said depositions is informal and insufficient.

The defendant aforesaid also moves the court to suppress the deposition of Edward T. Osborn, which appears on the files of said cause, for the reasons named above as to the depositions of D. Thew Wright and M. E. Ingalls, and for the further reason that the same are not properly certified, and the certificate of the officer purporting to have taken the said depositions is informal and insufficient.

HARRISON, HINES AND MILLER,
Sol's for D'f't, White Water Railroad Co.

And afterwards, to wit, at the November term of said court, on the 5th day of February, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by D. Thew Wright, Esq., his solicitor, and, with leave of court, files his replication to the answer herein in the words following, to wit:

And now come the said complainants and make replication to the answer of said defendants and say:

138 These repliants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereto say that they will aver and prove and maintain their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto, without this, that any other matter or thing whatsoever in the said answers contained material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this hon. court shall direct, and humbly pray as in their said bill they have already prayed.

D. THEW WRIGHT,
Sol. for Compl'ts.

And afterwards, to wit, at the November term of said court, on the 9th day of February, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

139 The complainants having given due notice that they desire the testimony in this cause to be taken orally, it is ordered, by consent of counsel for both parties, that all witnesses to be examined herein shall be examined orally before an examiner of this court; and it appearing that certain of said witnesses reside at or near the city of Cincinnati, State of Ohio, it is ordered, by like con-

sent of counsel, that William B. Burnet, Esq., of said city, be, and he is hereby, appointed a special examiner to take such testimony according to law and the rules and practice of this court; and he is hereby given all needful power and authority, and counsel for either party has leave to withdraw any or all files in the cause for use before such examination.

And afterwards, to wit, at the November term of said court, on the 3rd day of November, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

The complainants, on motion of Sam'l R. Matthews, have leave to file an amendment to their bill and supplemental bill, which is done, the said complainants stipulating that all the allegations
140 of such amendment shall be deemed denied by the defendants without any answer being filed. The question of costs arising upon the amendment is reserved.

And said amendment is in the words following, to wit:

And your orators further say that at the time the said several contracts were made between the said railroad companies and between the said Indianapolis and Cincinnati Railroad Company and said Lord and Smith for the construction of said Hagerstown Branch the said railroad companies had not nor had either of them any right of way between said Cambridge City and Hagerstown or other property upon or through which to construct said branch, but the entire right of way over and upon which said branch was constructed was acquired by said Smith and Lord, the contractors aforesaid, and so far as paid for was paid for by the funds arising from the sale of the scrip now held by your orators.

And afterwards, to wit, at the November term of said court, on the 4th day of February, A. D. 1882, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

141 Comes now the defendant, by Harrison, Hines and Miller, its solicitors, and files an amendment to its answer herein and its answer to the amended bill herein in the words following, to wit:

Amendment to the answer of the White Water Railroad Company and answer to the amendment of the complainants' bill of complaint which was filed November 3d, 1881.

The White Water Railroad Company, for amendment to her answer and in answer to so much of the complainants' amendment to their amended and supplemental bill of complaint, which amendment was filed November 3, 1881, by leave of court, and for answer unto so much of said amendment as she is advised is material for her to answer unto, says that she has no knowledge as to the allegations of said amendment concerning the acquisition of the right for said railroad between Hagerstown and Cambridge City, but she is informed and believes and therefore avers the fact to be that very considerable portion or portions of such right of way between said

points had, before the making of said contract of November 4th, 1867, been acquired or contracted for by said White Water Valley Railroad Company or donated to said last-named company for the construction of its railway between Hagerstown and Cam-
142 bridge City, and such portions were in fact used by said Smith and Lord in the construction of said section of railroad; and this defendant avers the fact to be that all the said right of way between said Hagerstown and Cambridge City was acquired under the franchises and in the name of said The White Water Valley Railroad Company; but this defendant is not informed as to the descriptions of such portions of said right of way as were acquired before the date of said contract, and cannot give the same in detail; and this defendant further says that she is not informed other than by the allegations of said amendment to the complainants' bill of complaint whether the said Lord and Smith or said Indianapolis and Cincinnati Railroad Company or said Indianapolis, Cincinnati and Lafayette Railroad Company paid for such right of way or any portion thereof by funds arising from sales of said scrip, and she therefore denies the same.

And this defendant says that the several other matters and things are as stated in her answer to the complainants' bill of complaint, heretofore filed, and she prays to be hence dismissed with her costs.

THE WHITE WATER RAILROAD COMPANY,
By HARRISON, HINES & MILLER, *Her Solicitors.*

143 *Stipulation.*

It is agreed that the foregoing amendment may be filed and taken as part of said defendant's answer in this cause.

SAM'L R. MATTHEWS,
Sol'r for Compl.

Rec'd copy.

SAM'L R. MATTHEWS,
Sol'r for Compl.

And afterwards, to wit, at the May term of said court, on the 28th day of June, A. D. 1882, before the Honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Now comes defendant, The White Water Railroad Company, by Harrison, Hines & Miller, *his* solicitors, and moves the court that the appointment of William B. Burnet as examiner in this cause heretofore made be terminated and ended.

And the court takes the same under advisement.

And afterwards, to wit, at the May term of said court, on the 10th day of June, A. D. 1884, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Now come the complainants, by D. Thew Wright and Samuel R. Matthews, their solicitors, and the defendant, The White
144 Water Railroad Company, by Harrison, Hines & Miller, its solicitors, and The Indianapolis, Cincinnati and Lafayette

Railroad Company, by Baker, Hord & Hendricks, its solicitors, and this cause having heretofore been heard by the court upon the amended and supplemental bills of the complainants and upon the answers thereto and the replications of the complainants and the evidence and stipulations of counsel and the argument of counsel, the court does now find that the whole of said line of railroad extending from the town of Harrison, in Dearborn county, to the town of Hagerstown, in the county of Wayne and State and district of Indiana, including the portion thereof lying and extending between the city of Cambridge City and the town of Hagerstown, in the county of Wayne aforesaid, being the same portion thereof named in the original, amended, and supplemental bills of complai*nant*, is now owned and possessed by the defendant, The White Water Railroad Company, under the mortgage of the White Water Valley Railroad Company, of date August 1, 1865, to William Dwight, Thomas Dwight, and Daniel Thew Wright, trustees, to secure the holders of bonds issued thereunder (which mortgage was duly recorded in Wayne county aforesaid), and under and by virtue of a foreclosure thereof, which mortgage was executed, acknowledged, delivered, and recorded before the contracts of
145 December 4th, 1867, and before the *claim* claims of the complainants originated and of which they had notice before the existence of their said claims, and that the only equitable relief to which complainants are entitled is a possible right to redeem from said mortgage.

It is therefore ordered, adjudged, and decreed by the court that the said complainants have thirty days in which to start to proceed to redeem from said mortgage under which said defendant, The White Water Railroad Company, now owns and possesses said railroad line, including that part of the same lying and situate between the town of Hagerstown and Cambridge City, as set out in said bill of complaint, and that in default of such proceedings within the time limited the complainants' bill of complaint be dismissed for want of equity.

And now come the complainants, by their solicitors aforesaid, and elect to take no proceedings for redemption from said mortgage. Whereupon it is ordered, adjudged, and decreed by the court that the complainants' bill of complaint be dismissed with costs.

And now said complainants pray an appeal from this court to the Supreme Court of the United States, which is granted upon condition that they file a proper appeal bond, with sureties, to be approved by the court, in the penal sum of $350.

146 And afterwards, to wit, at the November term of said court, on the 25th day of April, A. D. 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants and show to the court that on the 10th day of June, 1884, a final decree was rendered by this court dismissing their bill for want of equity, and they prayed an appeal from said decree, which was granted, and they were required to ex-

ecute, within 60 days thereafter, their bond upon such appeal in the sum of $350; that said appeal has never been perfected, and they pray that a new appeal may now be allowed; and the court, having considered their said petition, doth now order that the defendants herein be, and they are hereby, cited to appear and show cause, if any they have, on or before the 12th day of May, 1885, why the prayer of said petition should not be granted, and the clerk is directed to issue to the marshal a certified copy of this order for service upon the defendants or their attorneys of record in said cause.

Petition for Appeal.

147 Now come the complainants in the bill and supplemental bill filed herein, as also the complainants in the cross-bill, and represent to the court that on the 10th day of June, A. D. 1884, a final decree was entered in this cause finding the equities against said complainants and dismissing the bill, supplemental bill, and cross-bill, and that thereupon the said complainants prayed an appeal in open court, which was allowed, and bond fixed in the sum of $350.00, to be given in sixty days from the entry of said decree.

Your petitioner further represents that said appeal was never perfected, but your petitioners pray that a citation may issue to the defendant, The White Water Valley Railroad Company, in this suit, commanding it to appear in court, which citation may be made returnable according to law and the practice of this court, and that, upon the coming in of said defendants, your petitioners pray that a new appeal may be granted, and that the court will fix the amount of the bond proper to be given in such cases.

D. THEW WRIGHT,
C. B. MATTHEWS,
Solicitors for Complainants.

148 And afterwards, to wit, at the May term of said court, on the 4th day of June, A. D. 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, and, on motion of the plaintiffs, by C. B. Matthews, Esq., their solicitor, their petition for a reallowance of their appeal herein is dismissed without prejudice.

And afterwards, to wit, at the November term of said court, on the 3rd day of February, A. D. 1886, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by Mr. C. B. Matthews, their solicitor, and pray an appeal to the Supreme Court of the United States, which appeal is hereby granted upon the filing of an appeal bond herein in the sum of $350.00.

And thereupon said complainants now file their appeal bond herein in the sum of $350.00, with Allen M. Fletcher as surety thereon, which bond is approved by the court.

149 United States of America to the White Water Valley Railroad Company and the Indianapolis, Cincinnati and Lafayette Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal which has been granted in a certain cause wherein William D. Thompson, Thomas H. Jenkens, Andrew Moody, Benjamin E. Smith, Henry C. Lord, Joseph H. Rhodes, Lucinda Chapman, Samuel J. Broadwell, and Danuel Thew Wright, trustees, The Indianapolis Rolling Mill, Samuel J. Broadwell, Nathaniel Wright, Sr., William B. Wright, Mary F. W. Curwen, Juliet F. Wright, and Louisa W. Stephenson are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* one of the judges of the circuit court of the United States for said district, this 3d day of February, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal Circuit Court of the United States, District of Indiana.]

WILLIAM A. WOODS,
U. S. Judge.

149*a* I served the citation on Harrison, Hines & Miller, at Indianapolis, February 10, '86, by reading same to W. H. H. Miller and leaving in his hands a copy of same, he being a member of the above-named firm.

EDWARD HAWKINS,
U. S. Marshal.

Service	2 00
Copy	1 00
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150 *Depositions.*

Circuit Court of the United States, District of Indiana.

WILLIAM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY R. R. *et al.* } No. 3311.

The defendants will take notice that on Thursday, the eighth day of October, A. D. 1874, the plaintiffs above-named will take the depositions of sundry witnesses, to be used as evidence on the trial of the above cause, at the law office of D. Thew Wright, No. 66 W. Third street, Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p.

m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

H. CRAWFORD,
D. THEW WRIGHT,
Attorneys for Plaintiffs.

Service of the above notice is acknowledged.
KING, THOMPSON & LONGWORTH.

Done this 3rd day of October, 1874.

Caption.

Depositions of sundry witnesses taken before me, H. F. Brashear, U. S. commissioner for southern district of Ohio, pursuant to the annexed notice and at the time and place therein specified,
151 to be read in evidence on behalf of the plaintiffs in an action pending in the circuit court of the U. S., district of Indiana, in which W. D. Thompson *et al.* are plaintiffs and the White Water Valley R. R. Co. are defendant, H. Crawford and D. T. Wright being present on behalf of plaintiffs and N. Longworth on behalf of defendant.

HENRY PRENTISS, of lawful age, being by me first duly sworn, deposes and saith as follows:

Questions by H. CRAWFORD:

1. Please state your name.

Ans. Henry Prentiss.

2. Residence and occupation.

Ans. I reside in Cincinnati; am secretary and treasurer of the White Water Valley railroad.

Ques. 3. How long have you been such officer?

Ans. Since July, 1872.

Ques. 4. Were you connected with the company before that time; and, if so, in what capacity?

Ans. Yes, sir. I was with the company since about June 1st, 1871. I was auditor up till July.

Ques. 5. Are the records of the proceedings of the board of directors of the White Water Valley railroad in your custody in this city as the officer of that corporation?

Ans. They are.

152 Ques. 6. Are the White Water Valley railroad operating a line of railroad extending from Cambridge City to Hagerstown?

Ans. They are.

Ques. 7. Do you know how much the amount of debt on the White Water Valley railroad is, in round numbers?

Ans. Nine hundred and forty-four thousand dollars.

Ques. 8. That is the mortgage debt. Is there besides that an income or equipment bonded obligation?

Ans. There is. That is not in full force yet, because the bonds are not yet placed.

Ques. 9. None of them placed?

Ans. There is forty-five hundred dollars of equipment bonds.

Ques. 10. $4,500 only placed?

Ans. That is all. I think there is $4,000 or $4,500. I think $4,500.

Ques. 11. The semi-annual coupons on the mortgage bonds are due?

Ans. February 1st and August 1st.

Ques. 12. What was the amount of interest due August 1st, 1874?

Ans. It was about thirty-seven thousand dollars.

Ques. 13. Be good enough to state whether the White Water Valley Railroad Company paid its interest on its bonded debt on the first of August.

Ans. Not entirely so; it did not.

Ques. 14. Why did it not entirely? Was it from lack of means?

153 Ans. I presume so. The arrangement was made by the president.

Ques. 15. Did the company, to your knowledge as the treasurer of that company, have means enough on hand from its earnings or other resources to pay the interest on its bonded debt in August and keep up its current expenses for operating the road?

Ans. Well, I think it had funds enough to pay the August coupon falling due then, but there was an extended coupon that fell due also—twenty thousand dollars.

16. Twenty thousand dollars besides the August coupon?

Ans. Yes, sir.

17. Did it pay the extended coupon?

Ans. Yes, sir; and fifty per cent. of the current coupon.

18. The balance it did not pay. Did it have the means to pay?

Ans. I say it did not have the money on hand at that time to pay them.

19. Did it make an application, to your knowledge as treasurer, to its creditors to extend the time of payment, giving as the reason that it had no funds to pay?

Ans. It made an application; the president did.

20. Was that based upon the fact that it was not able to pay the recurring interest on its bonds?

154 Ans. That I don't remember. I don't know that I ever read the circular. It was issued from Boston.

21. Was it a matter of consultation between you and Mr. Daniel Dwight, the president, or any other officer?

Ans. No, sir; but I understood it was arranged not to pay. Whether the company could have paid or not I could not say; but it was deemed advisable not to pay under the circumstances.

22. Still you did not have the money out of the earnings. Have you had the money since August first out of the earnings of the road to meet its obligations, or are they still in default?

Ans. There was an arrangement made to extend them until the first of November.

23. Do you mean to say there was an arrangement made by all the bondholders?

Ans. I so understood.

24. From whom?

Ans. From the president.

25. When?

Ans. Indirectly, at different times.

26. By all the bondholders?

Ans. Yes, sir; that they would do it, and I have since understood that they had done it.

27. When have you seen the president?

Ans. I have not seen him since July first.

28. Well, how have you understood this?

Ans. From his letters to other people, and I think he had
155 casually mentioned it to me that the bondholders would extend according to his plan.

29. Would extend. Then are you not mistaken in saying that since the first of August he has ever stated to you that they did extend?

Ans. I have not understood from him, but I have understood from the vice-president that they had done so.

30. You have not seen the president since the first of July?

Ans. About that time—the last of June, now I come to think of it.

31. What is your customary day of payment, for the payments of the preceding month?

Ans. We used to pay previous to the panic on the 12th.

32. Previous to the 12th of one month for the preceding month?

Ans. Yes, sir.

33. How many months is the White Water Valley Railroad Company in arrear now on its labor and supply bills?

Ans. It is not behind on its supply bills; on its labor bills nearly all the month of August is in arrear. There are some small amounts on the July roll, but not any considerable amount.

34. So that the company owes about all of the July labor bills?

Ans. No; August.

156 35. I mean the August labor bills and the September labor bills.

Ans. Yes, sir.

36. And a portion of July?

Ans. Yes, sir. I don't consider the September bills due until the 12th.

37. Is the company in possession of means at the present time, you being treasurer, to liquidate at the proper time in October the September pay-rolls?

Ans. I don't know that it could pay them all without inconvenience.

38. Besides the bonded debt of the road, please state whether the White Water Valley road has not guaranteed the payment of the Cincinnati and White Water Valley Railroad Company's bonds.

Ans. Yes, sir.

39. State how much that is.

Ans. Two hundred thousand dollars.

40. How many miles of railroad has the Cincinnati and White Water Valley road?

Ans. It is either two and one-tenth or two and three-tenths miles; I forget which. It is two and a fraction.

41. How much of the earnings of the White Water Valley road have been devoted to the payment of anything due on that guarantee obligation.

Ans. Not any that I know of. We paid our interest, the Cincinnati and White Water Valley interest, but we had receipts from the road. We have got larger receipts owing to our having that 2.1 miles of road.

157 42. The Cincinnati & White Water Valley road is leased, is it not, to the White Water Valley railroad?

Ans. Not formally.

43. Who is the president of the Cincinnati and White Water Valley railroad?

Ans. Mr. Dwight.

44. D. A. Dwight? He is also president of the White Water Valley railroad?

Ans. He is.

45. And as president of one he leased the other?

Ans. We run the road.

46. Well, under what kind of arrangement?

Ans. We receive its receipts coming from the road, you know, and pay its expenses.

47. Do you keep separate books of account?

Ans. We do not—for the receipts and expenses we do not. Anything properly belonging to the Cincinnati and White Water Valley road we have a separate set of books for.

48. Is there a separate set of books?

Ans. Yes, sir.

49. For recording the current receipts and expenses for operating?

Ans. No. Construction and such things as that.

50. How much did the construction of the Cincinnati and White Water Valley railroad cost?

158 Ans. I do not remember now.

51. What is about your estimate?

Ans. I should say about two hundred thousand dollars. I don't want to say, because I don't remember.

52. And for that $200,000 the White Water Valley road guaranteed $250,000 of bonds, did it?

Ans. $200,000.

53. Any stock also guaranteed?

Ans. No, sir; not that I know of.

54. And you say now that there is no formal lease, to your knowledge?

Ans. Not to my knowledge; no, sir.

55. That Mr. Dwight is the president of both?

Ans. He is.

56. And that Chapman Dwight is the vice-president?

Ans. No, sir; he is not.

57. Are you an officer of both companies?

Ans. I am.

58. And you say that the receipts and accounts of both companies are kept in one set of books?

Ans. We have a separate set of books for construction and for real estate and for such property as they have.

60. Out of the gross earnings that come into your hands as treasurer of the White Water Valley road you also pay, do you, the current interest of the Cincinnati and White Water Valley railroad bonds?

159 Ans. Yes, sir.

61. Have you paid them all?

Ans. Yes, sir.

62. These have all been paid up?

Ans. Yes, sir; the White Water Valley road is credited with it. It is credited with the interest, but their money has gone out.

63. In other words, the Cincinnati and White Water Valley railroad owes the White Water Valley for the bonded debt interest that has been paid?

Ans. Not entirely.

64. What amount?

Ans. Well, I cannot say just now.

65. That stands on your books as an asset, does it not, of the White Water Valley railroad?

Ans. It stands on the debit side as a ledger balance.

66. Can you give any idea of the amount of money that the White Water Valley road paid on account of the Cincinnati and White Water Valley railroad?

Ans. Well, you see that we calculate that the net receipts from the Cincinnati and White Water Valley road——

67. I just want the amount; that is all.

Ans. I could not state that to you without stating how it is. I want to explain my answer. I say that the net receipts of the Cincinnati and White Water Valley were considered to be sufficient to pay their interest, and the White Water Valley road have not at all times advanced the money to pay the interest. The Cincinnati and White Water Valley have done it themselves sometimes. I should say, perhaps, $6,000 or $7,000.

160

68. You say the net receipts are considered to be enough. What are the net receipts?

Ans. They are credited to be $14,000.

69. $14,000 a month?

Ans. For the whole year—net.

70. What are they in fact?

Ans. Well, that is what we estimate them to be.

71. When were they estimated—before the road was constructed?

Ans. No, sir; since.

72. The Cincinnati and White Water Valley railroad is entirely in the State of Ohio?

Ans. Yes, sir.

73. And you state that the net receipts of the Cincinnati and White Water Valley railroad—that is, two miles and a fraction—is $14,000, do you?

Ans. Yes, sir.

74. What are the gross receipts?

Ans. I will state to you how we get these net receipts. The difference between the contract between the White Water Valley road and the Indianapolis, Cincinnati and Lafayette railroad and that with the Ohio and Mississippi railroad and the margin that was
161 left, together with the local business we get now and did not get before.

75. Has it made it?

Ans. I have no doubt it has.

76. And that accumulated business, notwithstanding you do it over the White Water Valley railroad, you charge it up for the benefit of this little link?

Ans. No, sir.

77. Yes, you do. You say you calculate that the gross business of the road will be more by this link, so that it will represent a net profit on the link of $14,000 over what you get by your connection with the Indianapolis, Cincinnati and Lafayette railroad?

Ans. Yes, sir.

78. That is increased business over the whole road, is it not?

Ans. No, sir; it does not go over the whole road; some of it goes to Beeson and other stations.

79. But that is on the White Water Valley road?

Ans. Yes, sir.

80. So that it is the entire business that you give the benefit of to the link?

Ans. No, sir. This increased business does not come over the whole road.

81. It is increased business done simply on the link, is it?

Ans. Oh, no. We have the privilege of hauling 2.1 miles farther, and for that we get the proportion of the receipts, and by this
162 new connection we get some business we would not otherwise get.

82. And for that you give the exclusive benefit to this link, and call it $14,000?

Ans. All consider we can do it without any detriment to the main line.

83. You have paid interest on all the bonds of the Cincinnati and White Water Valley railroad that have been issued, and you have not paid on the old White Water Valley bonds?

Ans. Not entirely, this last coupon.

84. Do you know anything about how much in arrear the White Water Valley road is on the interest on the bonds?

Ans. What do you mean—the bonded interest?

85. Yes, sir.

A. I should say $40,000 or $50,000.

86. Ain't it larger than that? Do you know anything about

large coupons that Mr. William Dwight has held back and not funded at all?

Ans. I don't know; I haven't seen any.

87. Have you been told so by Mr. Daniel Dwight and other officers of the road in authority?

Ans. It has been so stated by report.

88. That is not my question. Have you not been advised by the president or vice-president that it should have—that William Dwight holds a large amount of coupons against the White Water Valley Railroad Company that he never exchanged?

Ans. I don't know; I only know we have a certain amount to pay, and that so much has been paid.

163 89. What do these amount to?

Ans. $40,000 to $50,000.

90. All told; not more than that?

Ans. I should think not more than $50,000. I always charge the coupon interest fully up and credit it with whatever is paid.

At this point witness was excused, to return again at 2 o'clock and to bring with him the record book of the White Water Valley R. R. Co.

H. F. BRASHEAR,
U. S. Commissioner.

Also S. J. BROADWELL, who, being of lawful age, being first duly examined, cautioned, and solemnly sworn, deposes as follows:

1. Please state your name and residence.

Ans. S. J. Broadwell, Cincinnati.

2. Are you one of the plaintiffs in the action pending in the circuit court of the United States, district of Indiana, in which these depositions are taken?

Ans. I am.

3. At what time did you become the holder of certificates issued by the Indianapolis, Cincinnati and Lafayette road on account of the Hagerstown line, and to what amount?

Ans. In the spring of 1868 or '69, while the Hagerstown Branch was being constructed.

4. What amount of certificates did you purchase?

Ans. I think it was $13,000. The pleadings will show that.

164 5. State whether you have been the owner of that amount of shares continuously from that time to the present.

Ans. I have.

6. During what length of time was interest regularly paid on the certificates to you?

Ans. June, 1870, I think, was the last dividend paid.

7. Please state whether, to your knowledge, or not such Hagerstown certificates were a subject of barter in the money markets of Cincinnati during the period of time from 1868 to 1870.

Ans. They were. There were some transactions in them.

8. State whether, prior to your purchase of the certificates and continuously until 1870, when the first failure to pay an interest in-

stalment occurred, you heard any question raised by any officer of the Indianapolis, Cincinnati and Lafayette road or the White Water Valley road as to any fraudulent or illegal character in the contract out of which these certificates arose or the certificates themselves.

(Objected to by counsel for defendant.)

Ans. Before making the purchase I interrogated the officers and attorneys of the White Water Valley road as to the character of these certificates and the nature of the security, and was in-
165 formed by both the officers and attorneys that the company was bound, and that the certificates were a lien upon the piece of road and upon its earnings, and I made the purchase upon the faith of these representations.

9. At the time you made the purchase state what particular relation, by way of lease or otherwise, the Indianapolis, Cincinnati and Lafayette road had to the White Water Valley road and to the Hagerstown Extension.

Ans. At the time I made the purchase the Cincinnati and Indiana Railroad Company was operated by the Indianapolis, Cincinnati and Lafayette Railroad Company under a lease, and the White Water Valley road, which connected with the Cincinnati and Indiana, was operated by the Indianapolis, Cincinnati and Lafayette Railroad Company under a lease, which lease of the Valley road to the Indianapolis, Cincinnati and Lafayette railroad was cancelled in the spring of 1871. This cancellation was made as between the two corporations, the certificate-holders not being parties.

Cross-examinations by Mr. LONGWORTH :

10. What purchases or sales of these certificates did you know of previous to purchasing yourself in Cincinnati ?

Ans. Well, I was informed that (I cannot say just as to the
166 time, but that I had understood that) Mr. Butler, Joseph C. Butler, and Mr. Nathaniel Wright and others were owners of the stock ; these are all the names I can recall just now.

11. You speak of the certificates being at that time the subject of barter and sale in the market of Cincinnati. What sales had you heard of about the time you purchased ?

Ans. I cannot now designate any particular sale, but I then received the impression that there were transactions taking place in them.

12. Do you remember whether the certificates were quoted in the market?

Ans. I think not.

13. Might it not have been that this impression was not founded upon any definite information of fact, but was simply an impression and nothing more ?

Ans. No ; because for the reason that at the time that I had purchased I knew the parties holding the certificates, and naturally presumed they had purchased them in the open market as I did.

14. Might it not have been that these persons had for a long time held the certificates?

Ans. That I do not know; I cannot say.

15. To what officers of the White Water Valley road did you apply for information with regard to the value of these certificates?

167 Ans. Mr. Lord—H. C. Lord—Jonathan Chapman, Judge Hoadley as counsel, and Nathaniel Wright as counsel, as I then supposed, as I was informed by him that he had drafted either the whole or a portion of the contract.

16. Please state as nearly as you are able just what Mr. Lord as president stated to you with regard to the nature of the security.

Ans. Mr. Lord stated to me that under the contract under which the Hagerstown road was built and the certificates issued that the holders of the same would have the first and best lien upon the Hagerstown Branch or road and all earnings appertaining thereto; that it was of great importance to the Valley road that this road be constructed to give them an outlet to the Chicago and Northern business.

17. Are you sure that Mr. Lord told you that under the contracts specified these certificates were to be a lien upon the road itself, or simply upon the earnings and profits of the road?

Ans. Upon the road as well as the earnings. My recollection, I would state, is distinct on that point, for the reason that before making the purchase I made particular inquiries in regard to these points both of Mr. Nathaniel Wright and Mr. Lord.

168 18. Please fix as nearly as you can the time when this statement was made by Mr. Lord to you.

Ans. I suppose I could look over my books and find the very date. I think it was about April or May or March—I don't know—1868. It was towards the close of the winter and within a month or two of the opening of the road.

19. Was this statement confirmed by the other officers to whom you referred?

Ans. You refer to Chapman?

20. To Chapman and Lord.

Ans. I don't recollect whether Chapman confirmed this or not. I don't think I talked with him on the point. I don't think I did.

21. What did Judge Hoadley say about it?

Ans. Judge Hoadley stated that the paper or the contract was drawn up and all the action of the board and the stockholders had under the supervision of Mr. Wright as well as himself, and that every step had been taken to make the security perfect.

22. The security upon the road?

Ans. The road and the earnings. I recollect his saying something like this, that it was copper fastened.

23. He might have said copper fastened and yet it be a lien upon the earnings only. I want to get at whether he stated it was a lien upon the road.

Ans. He stated it was a lien upon the earnings and property.

169 24. What did you understand and what do you now understand to be the Hagerstown Branch road?

Ans. It runs from Cambridge City to Hagerstown.

25. Were you informed at the time referred to or did you suppose this to be a part of the White Water Valley railroad built under the franchise or to be a separate and independent organization?

Ans. Well, I don't think that I made any inquiries upon that subject; if I did I have forgotten.

26. Why, then, did you ask information from the officers of the White Water Valley railroad? What interest did you suppose they had? Why did you go to them instead of inquiring of the officers of the Hagerstown Branch?

Ans. Because it was part of the line of the Valley road, and there were no officers of the Hagerstown Branch that I know of.

27. Did either of the gentlemen referred to tell you what the proceedings of the White Water Valley railroad had been?

Ans. No, sir; for the reason that I was satisfied in the general representation from them that the matter was all right, and that it had passed under their supervision.

28. Are you not now the president of the Cincinnati and Indiana Railroad Company?

Ans. No, sir; I am neither officer nor director in any railroad in existence that I know of.

170 29. Have you not been the president; and, if so, during what time?

Ans. I was president of the Cincinnati and Indiana railroad during the year, I think part of, 1871; but during the time that I was president the railroad and all its property was in the hands of the receiver of the Indianapolis, Cincinnati and Lafayette railroad.

30. From whom did you purchase the certificates?

Ans. From Mr. H. C. Lord.

31. At what price?

Ans. They cost me between 50 and 60 cents on the dollar; I think about 55 cents.

Witness wishes to correct his answer to question No. 28 by adding: I am a director of the Cincinnati and Indiana R. R. I had forgotten that.

S. J. BROADWELL.

The hour of 2 o'clock having now arrived and witness, Henry Prentiss, having appeared, bringing with — the record book of the White Water Valley R. R. Co., his examination was resumed by Mr. Crawford.

Counsel for the White Water Valley railroad, not having been present during the taking of the foregoing testimony, now appears and enters his protest against the same and all proceedings under the notice to take said depositions and objects to all the foregoing testimony as being incompetent, irrelevant, and impertinent.

171 Direct examination of HENRY PRENTISS resumed.

By Mr. CRAWFORD:

91. Be good enough to state whether there has been any separate account kept of the earnings on the part of the road between Cambride City and Hagerstown and that part of the line southward.

Ans. At the end of the year—the first year ending May, 1872—I made up a careful statement of the earnings and expenditures of the Hagerstown Branch you refer to—a careful and accurate statement.

92. Is that the only answer you have got to the question?

Ans. Yes, sir.

93. Has there been no account kept of the receipts and expenditures since that time?

Ans. No, sir; since May, 1872.

94. Are you keeping now any separate account of the receipts and expenditures on that line of the road as distinguished from the remaining line?

Ans. It would be very easy to get at it. It is all put down accurately.

95. It is not being done, is it?

Ans. No, sir; it is not necessary to keep the accounts so small. It can be made up at any time.

96. Have you with you the record of the proceedings of the board of directors of the White Water Valley Railroad Company?

Ans. I have.

172 97. Please examine the same and indicate the day and date on which any action is apparent upon the said record touching the construction of the line between Hagerstown and Cambridge City.

Ans. Well, the records previous to my taking them I am not familiar with. I would like you to give me a little time, and I will look them up, and whatever you wish to refer to I will look them up and give you copies.

98. Look at page 38 on the record.

Ans. Yes, sir.

99. State what it is.

Ans. Judging from looking at it I should think it was an agreement between the Indianapolis, Cincinnati and Lafayette and the Chicago and Great Eastern, Columbus and Indiana Central, and the White Water Valley and the Cincinnati and Indiana railroad as to business.

100. Will you please read it?

Ans. It is a minute of a meeting of stockholders, dated October 30, 1868, resolution number three, as follows:

"Resolved, That the contracts and agreements made and entered into on the 14th day of November, 1867, by and between the Columbus and Indiana Central and the Chicago and Great Eastern Railway Companies, party of the first part, and the Cincinnati and
173 Indiana, the Indianapolis, Cincinnati and Lafayette, and the White Water Valley Railroad Companies, party of the second

part, and executed by the respective presidents thereof, in the words and figures as below, be, and they are hereby, each and every one, by the stockholders of the White Water Valley Railroad Company, in all things ratified, adopted, approved, and confirmed, viz:

Whereas negotiations are pending between the Columbus and Indiana Central Railroad Company and the Chicago and Great Eastern Railway Company, corporations, respectively, under the laws of Ohio, Indiana, and Illinois, for the consolidation of their respective companies into one corporation, to be styled The Columbus, Chicago and Western Central Railway Company, the parties, in anticipation of their said consolidation, as parties of the first part, hereby enter into this contract with the Cincinnati and Indiana, Indianapolis, Cincinnati and Lafayette, and the White Water Valley Railroad Company, corporations organized under the laws of Ohio and Indiana, parties of the second part, witnesseth:

That for the purpose and object of enhancing the value of their respective properties, and of adding to the traffic and business between Cincinnati and Chicago, and of increasing and perfect-
174 ing their facilities for transporting passengers and freight, and of benefitting shippers and promoting the commerce of the cities and country tributary to these said roads between Cincinnati and Chicago the said parties of the first part and second part have agreed as follows, viz:

First. The different parties of the first and second parts hereby agree and contract to form a line of connecting roads for the transportation of freight and passengers between the cities of Cincinnati and Chicago and all intermediate points by way of the Cincinnati and Indiana and the White Water Valley railroad to Hagerstown or New Castle and the present Chicago and Great Eastern railway, the said line to be operated as one through route between Cincinnati and Chicago, without change of cars, upon mutual time-tables for all through trains, each party hereto providing adequate motive power for the prompt and efficient transaction of the joint business on its own part of said lines, and each to furnish the *pro rata* proportion of freight and passenger cars, according to the distance, between Cincinnati and Chicago adequate to the joint service, and each to keep its own road in good repair.

Second. The party of the second part agrees to furnish all
175 necessary and convenient yard room, depot grounds for the receipt, delivery, and handling of all passengers and freights, and for the sale of tickets; and the said parties of the first part agree to furnish similar and adequate grounds, facilities, and accommodations in the city of Chicago, and neither party shall permit its passenger, express, or freight cars to run over any other route or line from Cincinnati to Chicago or from Chicago to Cincinnati than the one herein provided for, nor permit the passenger or freight cars of any other railroad to run its line or any portion thereof when employed in transacting or competing for the joint business contemplated and provided for in this contract; and the parties to this contract shall sell no tickets to Chicago or Cincinnati or intervening points except by this line, unless otherwise specially requested by

the purchaser, and shall bill and ship all freight destined for Chicago or Cincinnati or intermediate points over this line, unless otherwise specially marked or ordered by the shipper. All business, whether passenger or freight, from Cincinnati to Chicago and points north and west therefrom, and from Chicago and points north and west therefrom to Cincinnati, which has hitherto been done by the Chicago and Great Eastern Railway Company by way of Richmond,
176 or by the party of the second part by way of Indianapolis or Lafayette and Michigan City, shall hereafter be done and transacted, in so far as the same can be influenced by the parties hereto, over the through route specified and provided in this agreement.

Third. All business, both passenger and freight, between Cincinnati and points on the line of the roads running west of Logansport to Peoria and Warsaw and all points north thereof, in so far as the same can be influenced or controlled by the parties hereto, shall be done over the line provided for in this agreement.

Fourth. A joint through tariff of rates of freight and passenger shall be agreed upon by the parties hereto, but the same may be modified and changed at any time by their respective presidents and superintendents to meet competition or whenever in their judgement the interests of the through line shall require such a change or modifications, and all through freights shall be billed from points of shipment to points of destination, and the form of manifests and the time and mode of settlements of such business between the parties hereto shall be regulated from time to time by their respective superintendents or general freight agents. Freight or merchandise lost or damaged while in transit shall be paid for by the
177 party on whose road the loss or damage occurred; but when such loss or damage cannot be located it shall be paid and prorated by the whole line between Cincinnati and Chicago.

Fifth. A joint local freight and passenger tariff between Cincinnati and Chicago and intermediate points and points west of Logansport shall be agreed upon, but the same may be modified or changed by the respective superintendents or general officers when such change shall be required by the general interest or profit.

Sixth. All through rates or fares shall be prorated according to distance, but each party shall be allowed to charge its local tariff on business to and from intermediate stations, excepting in cases where rates are in competition with other lines of transportation, when the rates shall be prorated.

Seventh. Each party shall be at the expense of printing its own tickets, but the costs of joint advertisements, posters, agents or employees, and baggage checks shall be prorated according to length of line.

Eighth. Settlements of all joint freight and ticket accounts and balances, including car service, shall be made monthly, the latter at the following rates: Passenger cars, three cents; express
178 and baggage cars, two cents; freight cars, one cent per mile; but no mileage shall be charged for sleeping cars.

Ninth. All passenger and freight traffic between Cincinnati and local points on the line of the Columbus and Indiana Central road west of and including Richmond shall, in so far as the same can

be controlled or influenced by the parties of the first and second parts, be done by the way of the White Water Valley and Cincinnati and Indiana roads. For all such business a joint tariff shall be agreed upon, which may be modified from time to time as competition or the interests of the parties hereto may demand. All rates of passengers and freight between Indianapolis and Cincinnati shall be fixed by the party of the second part; but all the through traffic between Indianapolis and parts beyond and Cincinnati which the parties of the first part may from time to time control or handle shall, in so far as the route can be controlled by said parties, be billed and forwarded by way of the White Water and Cincinnati and Indiana road-, and the through rate shall be prorated by the roads of the first and second parties according to the distance.

Tenth. Through time-tables between Cincinnati and Chicago for all trains requisite for the business of the through line shall
179 be agreed upon by the superintendents of the respective roads, parties hereto, and shall be changed from time to time as the business of the line shall require; but it is hereby agreed that there shall be a morning and evening passenger train from Chicago to Cincinnati and from Cincinnati to Chicago, the time of the arrival and departure of said trains to be fixed so as best to accommodate and develop the joint through business and at the same time to accommodate, as near as possible, the time of the eastern trains of said parties of the first part to and from Logansport; and the party of the second part further agrees that it will at no time discriminate in its tariff or rates for passengers or freight or the management of its business in favor of its route to Cincinnati or in favor of routes running east of Cincinnati against the route of the party of the first part via Richmond from points on the White Water Valley road.

Eleventh. There being no legal impediment thereto, this contract shall come into effect on the final consolidation of the said companies, parties of the first part hereto, and shall continue in force for twenty years thereafter.

In testimony whereof the parties to these presents have
180 caused the same to be signed by their respective presidents and their corporate seals to be hereto affixed this 14th day of November, 1867.

(Signed) COLUMBUS AND INDIANA CENTRAL RAILWAY CO.,
By BENJAMIN E. SMITH, *Pres't.*
CHICAGO AND GREAT EASTERN RAILWAY CO.,
By W. D. JUDSON, *Vice-Pres't.*
INDIANAPOLIS, CINCINNATI AND LAFAYETTE RAILROAD COMPANY,
By H. C. LORD, *Pres't.*
CINCINNATI AND INDIANA RAILROAD,
By H. C. LORD, *Pres't.*
WHITE WATER VALLEY RAILROAD COMPANY,
By H. C. LORD, *Pres't.*"

101. Is there anything else at that meeting touching the transaction than what you have read?

Ans. Not in relation to this, I think.

102. Look at pages 35 to 37.

Ans. Yes; there is something of that kind.

103. Is it a meeting of directors?

Ans. It is a meeting of the stockholders.

104. State what that action is.

Ans. It appears to be in reference to the Hagerstown Branch—the construction of it. I attach a copy of the resolution confirming the contract to my deposition as Exhibit "A."

105. Now, you will *you* turn to the record of July 12, 1869.

Ans. A resolution was adopted on motion of Mr. Farquhar, which I attach to my deposition as Exhibit "B."

106. Be good enough to turn to pages 43–44 and read what is recorded there.

Ans. "Whereas a contract has been this day entered into
181 between the Columbus and Indiana Central Railway Company and the Chicago and Great Eastern Railway Company, parties of the first part, and the Cincinnati and Indiana Railroad Company, the Indianapolis, Cincinnati and Lafayette Railroad Company, and the White Water Valley Railroad Company, parties of the second part, providing for the interchange of business between said parties over their lines of road respectively between Cincinnati and Chicago and Indianapolis for the term of twenty years after the consolidation of the companies of the parties of the first part shall be perfected: Now, in consideration of said contract, it is mutually agreed between the parties hereto that the transportation of freight and passengers over said line between Cincinnati and Chicago and Indianapolis and intermediate points shall be commenced so soon as the parties of the second part are prepared therefor, there being at that time no legal impediment thereto, and shall be conducted according to the terms specified in said contract, and shall be continued until said consolidation is carried into effect or abandoned. In consideration also of the execution of said first-named contract the parties of said second part hereto have
182 agreed, and do hereby agree, to purchase of the company, to be funded by the companies, parties of the first part, $500,000 first-mortgage consolidated bonds, with sinking fund to be issued by said consolidated company, being part of a proposed issue of fifteen millions of dollars of bonds to be issued by said consolidated company, payable in forty years after date, bearing 7 per cent. interest, payable semi-annually in New York, with a sinking fund at the price and rate of 85 per cent. of the par of said bonds, adding accrued interest, payable as follows: $56,000 to be paid on the 15th day of February, 1868, or as soon after as said bonds are ready for delivery, and the same amount to be paid in 1, 2, 3, 4, 5, 6, 7 months thereafter, and the balance in 8 months, a rateable proportion of the bonds to be delivered as the several payments are made; and said parties of the first part also further agree that they will, at the same date upon which said first delivery of bonds is made and paid for,

loan the said consolidated company 150,000 dollars in cash, returnable and payable in equal proportions in 9, 12, 15, and 18 months thereafter at 7 per cent., to be secured by similar bonds (part of the same issue); and also in six months after the date of said loan
183 to make to said company an additional loan of $100,000, returnable and payable within the same periods, at the same rate of interest, and to be secured in like manner: Provided, however, That in case said parties of the second part shall within six months purchase of said consolidated company an additional amount of said bonds at 85 per cent. and accrued interest to produce $100,000 (which it is hereby agreed they shall have the right to do), then and in that case they shall not be called upon to make said additional loan.

In testimony whereof the parties to these presents have caused the same to be signed by their several presidents and their corporate seals to be hereto affixed this 14th day of November, 1867.

(Signed) COLUMBUS AND INDIANA CENTRAL RAILWAY COMPANY,
By B. E. SMITH, *Pres't.*
CHICAGO AND GREAT EASTERN RAILWAY COMPANY,
By H. C. LORD, *Pres't.*
CINCINNATI AND INDIANA —— COMPANY,
By H. C. LORD, *Pres't.*
WHITE WATER VALLEY RAILWAY COMPANY,
By H. C. LORD, *Pres't.*

AMOS TENNEY, *Secretary.*"

Counsel for the White Water Valley railroad, protesting that these depositions are not being taken in pursuance of legal notice; that the questions and answers are not being taken or reduced to writing by the United States commissioner, notary public, or other officer, or by any other person in his presence, but as given are noted
184 down in characters or figures, known as stenography, unintelligible to the witness or to defendant's counsel, protesting and objecting to said depositions, now proceeds under protest to cross-examine.

Cross-examination:

107. What have been the earnings of the White Water Valley railroad during the past month? Are you able to state?

Ans. I judge them to be about $23,000.

108. Do you refer to the gross or net earnings?

Ans. Gross.

108. Are the earnings of the White Water Valley road at present and the prospective earnings for the coming season sufficient to make it probable that the road will be able to meet all its legitimate indebtedness as it matures?

Ans. I think so.

109. Are the earnings at the present time sufficient to meet all the obligations of the company as they mature?

Ans. Yes, sir.

110. Have the holders of any of the outstanding mortgage indebtedness of the road begun proceedings or threatened proceedings for foreclosure against the road to satisfy any such indebtedness?

Ans. Not to my knowledge.

111. Were any such demand or proceeding instituted or made by any such creditor to compel them would not the road be able to meet it?

185 Ans. Yes, sir; I think so.

112. Is the road from Valley Junction to North Bend a part of the White Water Valley railroad, or is it owned by some other corporation?

Ans. It is owned by the Cincinnati and White Water Valley Railroad Company.

113. That is a separate corporation?

Ans. It is.

Redirect by Mr. CRAWFORD:

114. What are the present earnings of the White Water Valley railroad?

Ans. I stated $23,000, for the month of September.

115. Is that estimated or actual?

Ans. It is, really, actual. I don't know just to dollars and cents.

116. Is that an average month of the year, or more or less than average?

Ans. I think it is not—will not be in future.

117. Judging the future by the past, is it an average or more than an average or less than an average?

Ans. Taking it since we have operated the road, I should say it is just about an average. Usually the month of September is an average month.

118 Better than an average?

Ans. I think not, sir.

119. Well, what are your gross receipts in the course of a year?

Ans. $200,000.

120. How much did they amount to last year?

Ans. Well, it depends upon when you take the year.

186 121. What is the close of your fiscal year on the road?

Ans. July first.

122. Well, take it, then, from the first of July, 1873, to the first of July, 1874, your last fiscal year, what were the gross earnings?

Ans. Two hundred and twenty thousand dollars; more than $220,000—some thousands more; I forget now.

123. Less than $230,000, was it?

Ans. Yes, sir.

124. Less than $225,000?

Ans. I think it was about $225,000.

125. You mean by that the entire line from Hagerstown to North Bend?

Ans. Yes, sir; so far as operated; it was not operated for more than 4 or 5 months of that year.

126. And that includes the portion upon which the Hagerstown certificate-holders claim a lien, from Hagerstown to Cambridge City, does it? And then the road from Cambridge City to Harrison? And then the line of the Harrison Branch railroad from Harrison to Valley Junction? And then the Cincinnati and White Water Valley road? All of these making up that $225,000?

Ans. The Cincinnati and White Water Valley was only open four or five months; for a month or six weeks the business of the White Water Valley road was diverted; it was stopped from going
187 over the Cincinnati and White Water Valley railroad; it was stopped at Valley Junction.

127. How does September of this year compare with September of last year? Is it the same?

Ans. No, sir; it is more.

128. How much more?

Ans. About two thousand dollars more.

129. What percentage do you operate the road at?

Ans. I forget now. Between 50 and 60 per cent. I should say.

130. Which should you say?

Ans. Between the two.

131. About where? Cannot you give anything near?

Ans. I don't remember now.

132. Have you got any knowledge on that subject, Mr. Prentiss?

Ans. I have. I said I had knowledge between 50 and 60 per cent. I would not place it any nearer than that.

133. Do you think it is nearer 50 than 60?

Ans. I don't know.

134. Are you operating it for just about the same per cent. now that you did a year ago?

Ans. I should say so.

135. You think 55 per cent. would by a fair average?

Ans. I could not say.

136. Have you ever made up the accounts showing the proportion of operating expenses to gross expenses?

Ans. They have been made up.

188 137. I say did you make them up, ever?

A. I did not.

138. Does that include—do you include under the head of operating expenses? What do you include—taxes on all the roads or simply the mere labor bills and supply bills?

Ans. Sometimes we do and sometimes we do not. I don't remember whether we did this year or not.

139. Do you include the rentals for other lines?

Ans. Not for the Harrison Branch.

140. Don't include that? That is to be excluded from your 50 or 60 per cent. How much is the rental of the Harrison Branch?

Ans. $16,000.

141. That is to be added, then, to the percentage, is it? Do you

include in that proportion a year's interest on the Cincinnati and White Water Valley bonds?

Ans. I do not know that that is a part of the operating expenses.

142. Do you include it?

Ans. I say I don't know whether it is.

143. Have you no idea on the subject?

Ans. I think it is not.

144. Do you include in your statement of operating expenses the payment of salaries for the officers of the Cincinnati and White Water Valley Railroad Company?

Ans. If anything, they are included in that.

145. Well, are there any?

Ans. Not that I know of.

189 146. I make the same questions with regard to the Harrison Branch. There are salaries there, are there not?

Ans. I believe the articles of association specify that there shall be no salaries paid. I have not received any.

147. From what do you draw your conclusion that the business hereafter will be such as to enable the company to properly meet its bonded-debt interest?

Ans. From our local business and our connections.

148. What connections—what do you mean by that?

Ans. I mean our connections at Beeson's, Hagerstown, — Cambridge City.

149. You have no new connections?

Ans. No new roads that I am aware of. I understand we have arrangements.

(Objected to.)

150. What percentage of increase have you estimated the business of the present year over the business of last year?

Ans. I should think it ought to be 30 to 33 per cent.

151. To what would you refer that anticipated increase? To your connection at Beeson's?

Ans. Better condition of business generally and from our connection with other roads—our arrangements with other roads.

152. Your business this year has been better than last—a trifle?

Ans. It has been better.

190 153. And you conclude it will be from 30 to 33 per cent. better next year?

Ans. I mean from the fiscal year—from the 1st of July. I think so; it is reasonable to suppose so.

154. In September you testified, if I understood you, that the gross receipts were about $23,000, and that was from $2,000 to $3,000 greater than last year. That is not 33 per cent. increase.

Ans. No.

155. Go to August, then. How much was your August business in 1874 an increase over 1873?

Ans. About the same ratio as the other, I should say.

156. That is about ten per cent., I think?

Ans. Yes, sir.

157. How much was July?

Ans. About the same.

158. How do you reason from the 10 per cent. that you will get a 33 per cent. average increase?

Ans. I judge so from the situation.

159. Have you practically anything whatever to do now with the making up of the traffic or making the connections or arrangements with different roads to bring business to the White Water Valley?

Ans. No.

160. You are nothing but the accountant in the office to take care of the finances or the books?

Ans. I do that, sir.

191 161. And are you familiar with the traffic?

Ans. I am more or less familiar, because I hear it and see it myself.

162. You know very little about it, in fact, don't you?

Ans. I don't think that.

163. Your estimate would not be so reliable as a person engaged in the active management, as Mr. Britton or Mr. Chapman Dwight or the vice-president?

Ans. I don't know. My intellect is not so great as theirs.

164. You don't know about the making of the traffic, but only the figures?

Ans. I think sometimes a person seeing the figures can judge as well as others. I could not state in detail, but that is my opinion; that is my impression.

165. Your impression is that the business for the fiscal year ending in July, 1875, will show an increase of 30 to 33 per cent. over the business ending in July, 1874?

Ans. I do.

166. You gather that mainly from the figures?

Ans. I cannot say. I cannot split hairs about it.

167. And the figures, you say, show an increase of about 10 per cent.?

Ans. I should say about that.

168. You answered, Mr. Longworth, that if any bondholders who had unpaid interest should institute measures to foreclose the

192 road the road would be able to pay them off. How much past-due debt did you state this morning stood against the road? Somewhere about $50,000, was it not?

Ans. I said from $40,000 to $50,000. I should have said any bondholder that was at odds with us.

169. Please explain what you mean by that—"at odds" with you?

Ans. I mean simply to say from any bondholder who would like to or had any probability of doing any such thing.

170. How large a floating debt have you?

Ans. I should say about $200,000.

171. $200,000 floating debt?

Ans. Well, what do you mean by floating debt?

172. I mean debt unsecured by mortgage.

Ans. Well, there is not much; about $100,000.

173. What do you mean by the $200,000? What is the other $100,000?

Ans. I consider that the other is secured by mortgage.

174. Secured by mortgage?

Ans. The other is secured by equipment lien.

175. How much?

Ans. About $100,000.

176. And then another $100,000 of floating debt, unsecured by mortgage? Is the paper of the White Water Valley railroad outstanding for that or is it in the shape of an open account?

193 Ans. Some portions of it.

177. In what proportions is it?

Ans. I cannot say just; the principal proportion of it is in notes.

178. Notes of the White Water Valley Railroad Company?

Ans. Yes, sir.

179. How much of that was incurred for the construction of the Cincinnati and White Water Valley railroad?

Ans. Not any that I know of.

180. Did the company during that construction give any notes to your knowledge that went into the construction?

Ans. They gave an $800 note. The White Water Valley railroad gave it because the Cincinnati and White Water Valley railroad had not issued their bonds. That was paid by the Cincinnati and White Water Valley.

181. How did the Cincinnati and White Water Valley pay it—out of the monies they realize from the sale of bonds?

Ans. Yes, sir.

182. You said, I believe, this morning that there was no separate account kept of the Cincinnati and White Water Valley road, except for construction?

Ans. Until the road was completed the accounts were kept entirely separate.

183. The current business—earnings and expenditures—of the Cincinnati and White Water Valley road, I understand that no separate account of these is kept?

194 Ans. No separate account of the receipts and expenditures.

184. They go entirely the gross receipts on the books of the White Water Valley Railroad Company, do they not?

Ans. Yes, sir.

185. And all expenditures on account of that line are paid by the White Water Valley railroad line, are they not?

Ans. If they are not for construction.

186. Operating expenses?

Ans. Yes, sir.

187. And I understand you to say there is no lease between the lines at all?

Ans. No personal lease that I know of.

188. And Mr. D. A. Dwight is the president of both companies?

Ans. I so stated this morning.

189. Do you include in the debt of the White Water Valley Railroad Company the land purchased where the elevator is situated down here, or was that purchased by the Cincinnati and White Water Valley railroad?

Ans. I think it was purchased by the Cincinnati and White Water Valley railroad.

190. From whom was it purchased?

Ans. I think it was from Mr. Dwight.

191. Which Mr. Dwight?

Ans. Daniel A. Dwight.

192. Was he then the president of the White Water Valley road?

Ans. He was.

195 193. And also of the other?

Ans. I think so.

194. Was cash paid for that?

Ans. It was.

195. What company was it paid by?

Ans. It was paid by the Cincinnati and White Water Valley railroad.

196. I will ask you whether the evidence of that payment is shown anywhere on the books of the White Water Valley railroad?

Ans. No, sir.

197. None whatever? Are you an officer of the Cincinnati and White Water Valley railroad?

Ans. I am.

198. Where did they derive the means to make that payment?

Ans. From their resources.

199. From their sole resources—the bonds?

Ans. Yes, sir.

200. And these bonds were guaranteed by the White Water Valley railroad?

Ans. Certain of them—all of them, I think.

201. How much was paid by the Cincinnati and White Water Valley railroad'- president for that property, do you know?

(Objected to.)

Ans. It seems to me it was $20,000.

202. Is the equipment on the White Water Valley railroad owned by it?

Ans. Some portions of it.

203. What proportion, do you know?

Ans. I should say about $\frac{1}{8}$ or $\frac{1}{10}$?

196 204. Do you know what is the greatest amount—the estimated value of the entire equipment?

Ans. I should say $200,000.

205. And who owns the other nine-tenths?

Ans. It is owned by various parties.

206. For instance?

Ans. It is controlled by the Dwights.

207. What do you mean by the Dwights—who? Specify more particularly.

Ans. I mean D. A. Dwight.

208. What do you mean—that it is controlled by him?

Ans. I mean that he has a lien on it.

209. Is that lien by way of mortgage or anything of that kind?

Ans. Yes, sir.

210. A mortgage?

Ans. I don't know what you term it; I suppose so.

211. Did you ever see it?

Ans. Yes, sir.

212. Who was it executed by on behalf of the White Water Valley railroad—Mr. Dwight?

Ans. By the president.

213. He is the president, is he not?

Ans. Yes, sir.

214. Is that shown anywhere in these records now?

Ans. No, sir.

215. Does the White Water Valley railroad pay rental to Mr. Daniel A. Dwight for the use of that equipment?

Ans. It does not. I will state here that any lien he may have is second. The trustees in the equipment are first.

197 216. Who are the trustees in the equipment?

Ans. William H. Hackett and R. M. Chapman.

217. That is the $100,000?

Ans. Yes, sir.

218. Outside of that there is another lien, is there?

Ans. Yes, sir.

219. For what amount is that?

Ans. Any amount that is necessary to secure the equipment mortgage after the bonds are paid.

220. The balance belongs to Mr. D. A. Dwight?

Ans. Yes, sir.

221. Has he a lien on it for any specified amount?

Ans. No, sir; not that I know of. My memory in regard to the thing is not very clear, but I know that the security was transferred to the trustees of the equipment.

222. Did the company pay out of its own earnings for the equipment?

Ans. A portion of it.

223. What proportion?

Ans. I told you about one-eighth.

224. Where did the balance come from to pay it?

Ans. It was advanced by Mr. Dwight.

225. Is that stated in the books as a debt to Mr. Dwight?

Ans. Yes, sir; it is. It is part of that that I told you I considered secured by a mortgage; somewhere about $100,000 I said.

226. Is the interest being paid on that debt?

Ans. It is.

198 227. At what rate?

Ans. Seven per cent.—the bonds.

228. Has the company been paying interest on that debt to Mr. Daniel A. Dwight?

Ans. It has paid some portions of it.

229. Has it paid any portion of the principal?

Ans. I think it has—a very little.

230. How long has that equipment been on the road?

Ans. It has been purchased at different times—about the first of 1872 the bulk of it, and part of it was put on in the latter part of that year, and some in 1873.

231. Did the company devote all of the surplus earnings it could spare to payment of the equipment account?

Ans. I think so.

232. And you say it has only been able to pay about one-eighth?

Ans. I would say about $25,000. I am mistaken. They have paid more than that, considerably.

233. How much more?

Ans. About seventy thousand dollars.

234. Did Mr. Daniel Dwight advance the balance because the company was unable to do it?

Ans. He did it, I suppose, to accommodate the company.

235. And the company were unable from want of means to advance it themselves, were they?

Ans. I don't say that. I don't remember.

199 236. Have they been able to pay any part of the principal of the debt to Mr. Dwight?

Ans. They have paid a small portion.

237. Of the principal? I do not understand you to say that.

Ans. I could not say so.

238. What is the amount of the credit to Mr. Daniel Dwight on the books of the company?

Ans. Very small; I should say $2,000 to $3,000.

239. To his credit?

Ans. Yes, sir.

240. Then are you not in error that he has a lien?

Ans. I am indistinct about that; I don't remember now. I think it is all transferred to the trustees. I made a mistake there.

241. Have you paid, has the company paid continuously the rental of the Harrison Branch since you have operated that branch?

Ans. Yes, sir; there is a small amount in dispute.

242. How much?

Ans. It amounts to between $3,000 and $4,000 now. It has accumulated for 4 or 5 dividends on 400 shares.

243. What is the monthly amount of your pay-rolls and supply bills generally?

Ans. About $8,000 to $8,500; somewhere along there.

244. Labor-rolls and supply bills?

Ans. Yes, sir; I should say between $8,000 and $9,000.

245. Then outside of that are your salary accounts paid on the labor-rolls?

200 Ans. They are.

246. What operating expenses are included outside of supply bills and labor-rolls—rentals of leased lines?

Ans. No, sir.

247. They are not on your labor-rolls and supply bills?
Ans. No, sir.
248. How much would they amount to? Did you ever foot it up?
Ans. What amount to?
249. All the outside operating expenses other than the mere labor, and the tolls, taxes, insurance, rentals, and everything—how much would it amount to in a month?
Ans. Probably $2,000 to $3,000.
250. About $11,000 a month, then—the operating outgo?
Ans. Hardly as much as that, I guess.

Recross-examination by Mr. LONGWORTH:

251. Are the accounts of the companies in such a shape that from them could be made up accurately a separate account of the earnings and expenditures, what they are at the Hagerstown Branch?
Ans. Yes. sir.
252. Can that be done with accuracy?
Ans. I think so; yes, sir.
253. When you say, therefore, that no separate account has been kept you mean simply that no separate book or page has been used for the account?
Ans. I do. I mean to say that from the data I have got I
201 could make an accurate account in very little time; that all the data are there to make an accurate account.
254. Were you a year ago about this time getting or receiving any passengers from the Pan Handle road?
Ans. No, sir; not from any through business—a very little local business, possibly.
255. Has not the business of the road during the past year been seriously decreased by reason of litigation with the Indianapolis, Cincinnati and Lafayette railroad, and the fact that the Harrison branch was temporarily in the hands of a receiver?
Ans. I think it has a little.
256. Are you not now receiving from and giving to the Pan Handle a great deal of business?
Ans. I think so.
257. In giving your statement with regard to the indebtedness to Mr. D. A. Dwight have you in giving these answers referred to your books for data?
Ans. I have not, sir.
258. Are not your answers in some respects a mistake. Have you not possibly confused in your own mind Mr. Daniel A. Dwight's private accounts and those of the road in some manner or other, so that the answers given are not very reliable?
Ans. I think perhaps I have. I stated afterwards that I
202 might have stated some things that were not so, not exactly understanding the question.

Redirect examination by Mr. CRAWFORD:

259. Have you any way of ascertaining accurately the receipts and expenditures of the White Water Valley road between Hagers-

town and Cambridge City, except by arbitrarily prorating certain general expenses by the mileage of the whole line?

Ans. Yes, sir; I think I can do it without that.

260. How would you divide the salaries of the superintendent and the managers and the general officers?

Ans. I would divide it according to the time and attention they gave to that portion of the road, according to the mileage on that road; not according to the whole mileage.

261. How do you mean—your trains run through from Hagerstown?

Ans. Yes, sir.

262. Every train that runs through from Hagerstown to Cincinnati?

Ans. Nearly all. One train runs to Harrison and back.

263. With regard to trains that run up to Harrison, do you pretend to say that you have got the data here that could regulate the expenses here in Cincinnati—your salary and others—by which you could get the correct amounts?

Ans. I mean to say as nearly as you could by doing it every month.

203 264. At least, would not you have to assume an arbitrary prorate by the mile?

Ans. I don't think I should do it that way.

265. The road is doing a large business with the Pan Handle, you say?

Ans. An increasing business.

266. Any new arrangement been made tending to increase the business?

Ans. I think so.

267. Do you know the date?

Ans. I could not say; perhaps within a month or two.

268. What do you think, now, has been the increase in business from the Pan Handle line within a month or two?

Ans. Well, we have not been giving or receiving business until recently—until within a few days—but it is increasing. I have told you the arrangement was made a month or two ago.

269. When did that large business begin?

Ans. I should say two or three weeks ago; I don't know for a fact.

270. In your judgement, do you regard the connection between Cambridge City and Hagerstown as valuable presently and prospectively, do you?

Ans. I could not give any opinion about that.

271. Could you give any idea about the quantity of business that you are doing with the Pan Handle?

Ans. I could not, safely.

272. Do you know how much it is a day?

Ans. I do not; no, sir.

273. Or how many cars you are getting a day—half a dozen?

204 Ans. I should say not probably that many.

274. Well, how many?

Ans. I don't know.

275. Getting any passengers?

Ans. Yes, sir.

276. How many, about?

Ans. I don't know.

277. You state that you are doing a large and very profitable business.

Ans. For the reason that all the business we get from that road is so much profit.

278. Is that the way you calculate—you run the trains and all the business you get from the Pan Handle road you put down in your accounts as clear profit?

Ans. I don't put it down in my accounts as clear profit. I think it is largely so. I cannot give a percentage.

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

I, H. T. Brashear, a commissioner of the circuit court of the United States within and for the southern district of Ohio, in the sixth judicial circuit, appointed, qualified, and commissioned, do hereby certify that the reason for taking the foregoing depositions is and the fact is that the said witnesses are out of the district in which the case is to be tried and to a greater distance than one
205 hundred miles from the place of trial, and that the same are necessary. I further certify that notification of the time and place of taking the said depositions above set forth was made out and served on counsel for defendants, who accepted in writing such notice, as will appear in said notice hereto attached. I further certify that on the 8th day of October, A. D. 1874, at the time and place in said notice specified, in the district aforesaid, I was attended by counsel for plaintiffs, Henry Crawford and D. Thew Wright, and also by Nicholas Longworth, counsel for defendants, and at the same time and place came Henry Prentiss and Samuel J. Broadwell, they being of sound mind and lawful age, and the said witnesses, previous to the commencement of said depositions, were carefully examined and cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions hereto appearing were taken down by a phonographic reporter, appointed by me as a clerk for that purpose, in presence of said counsel and said witnesses respectively, and in my presence, and was then by me reduced to writing as above set forth; and, as to S. J. Broadwell, read over by me in presence of said witness Broadwell, and thereafter subscribed by the said witness in my presence.

206 As to said witness Prentis this commissioner repeatedly requested him to appear, read over, or have read over to him the testimony taken down, to make any corrections, additions, or explanations he desired, and to sign the same. Said Prentiss refused so to do, and up to the sealing up of the same still refuses to do so. This commissioner submitted this testimony to counsel, N. Longworth, who kept the same in his possession for at least 10 days,

and who, this subscriber is informed and believes, submitted the same to said Prentiss. Said counsel returned said depositions to your commissioner, saying that said Prentiss had asked him whether he (the said Prentiss) could be compelled to sign the said depositions, and that he had advised said Prentiss that he could not.

Said counsel further stated to your commissioner that he believed said Prentiss would not sign his name to his deposition. Thereupon this commissioner made out a notice, a copy of which is hereto attached and marked "copy," and delivered the same personally at the office of said Prentiss, between hours of 2 and 3 o'clock, November 10, 1874.

That said Prentiss still refuses to sign said depositions up to the hour of sealing up the same, to wit, 2 o'clock, Nov. 11, 1874.

207 I certify that Exhibits A & B were introduced in evidence during the taking of above depositions.

I further certify that I am not counsel or attorney or relative of either party to said cause or in any manner interested in the event of the same.

All of which is here certified as to the reason for taking said depositions and the manner in which they were taken.

In testimony whereof I have hereunto set my official signature.

HERMAN F. BRASHEAR,
U. S. Commissioner for Southern District of Ohio.

Copy.

Office of H. F. Brashear, attorney-at-law, No. 66 West Third St.

CINCINNATI, *Nov. 10th*, 1874.

H. Prentiss, Esq.:

I have waited now several weeks for you to come up and sign your depositions in case of Thompson *et al. vs.* W. W. Valley Co. Further delay I consider a refusal on your part to sign. I shall keep them open, however, until to-morrow noon in order that you may appear and sign, and this is notice to you so to do. After that time, you still refusing to appear, I shall proceed in the manner set out in the U. S. statutes in cases where witnesses refuse to sign, etc.

Resp., yours, H. F. BRASHEAR,
U. S. Commissioner.

(Copy.)

208 EXHIBIT "A," referred to in deposition of Henry Prentiss.

Resolved, That the agreement made and concluded on the 7th day of September, A. D. 1867, by and between the Indianapolis, Cincinnati and Lafayette Railroad Company, by their committee, W. W. Smith, vice-president; T. A. Morris, L. B. Lewis, Henry C. Lord, and Benjamin E. Smith, for themselves and their associates, under the name of the Hagerstown Association of the White Water Valley Railroad from Cambridge City to Hagerstown, Indiana, as below, is on the part of the stockholders of the said White Water

Valley Railroad Company this day adopted, approved, ratified, and in all things confirmed, to wit:

Memorandum of an agreement made this 7th day of December, in the year 1867, between the Indianapolis, Cincinnati, and Lafayette Railroad Company, by their committee, W. W. Smith, vice-president; T. A. Morris, and L. B. Lewis, duly appointed and authorized for that purpose by the board of directors of that company, party of the first part, and Henry C. Lord and Benjamin E. Smith, acting in behalf of themselves and their associates under the name of the Hagerstown Association of the White Water Valley railroad, being an association formed for the construction and com-
209 pletion of said White Water Valley railroad from Cambridge City to Hagerstown, party of the second part, as follows:

Whereas by agreement between the party of the first part and the White Water Valley Railroad Company said last-named company has granted to said first party the perpetual use and possession of the railroad from Harrison to Hagerstown, which now is in possession and use of said first party; and whereas the part of said road between Cambridge City and Hagerstown has not been constructed by said White Water Valley Railroad Company, and by said agreement the party of the first part has the right to cause the same to be constructed under the charter of said White Water Valley Railroad Company and to make any reasonable contract with others for the construction of the same and to apply and pay the additional rent or compensation which would have been due to said White Water Valley Railroad Company if she had finished the road to any other party who should construct said unfinished portion of the road: Now, therefore, it is mutually agreed between the parties hereto that the said second party will construct and finish said railroad from Cambridge City and connecting therewith the railroad as already finished to Hagerstown, connecting there with the
210 Chicago and Great Eastern railroad, and will finish the same in a good and substantial manner as a first-class railroad, providing all requisite rights of way, grounds, and materials, with all necessary side tracks, depots, water stations, turn-tables, cattle-guards, culverts, bridges, and all other appendages and structures requisite to a first-class railroad; the iron rails to be of good quality, weighing not less than fifty-five pounds to the yard; the cross-ties to be of a length and size usual on first-class railroads, not less than twenty-five hundred to the mile; the culverts and cattle-guards to be of good masonry and road well ballasted, and the whole finished as a first-class railroad, ready for use on or before the first day of April next, and so far built that it can be used temporarily as soon as the weather will permit, and said first party to furnish without change any right of way or other conveniences for construction, if any such she should have or control along the portion of the road to be constructed, and said second party is to have the entire benefit of all subscriptions or donations which have been made or may hereafter be made for the construction of said portion of the road, and said first party is to furnish all reasonable facilities and conveniences

211 for doing the work, and in payment for said construction said first party agrees to issue to said second party or to such persons as they may direct and in such sums or amounts as they may desire the obligations of said first party, divisable into shares of one hundred dollars each, transferable only on the books of said first party, to the aggregate amount of two hundred and five thousand dollars, said obligation to be irredeemable, but binding said first party to pay to the holders thereof forever an annual interest of eight per cent. per annum, payable semi-annually, on the first days of June and December of each year, at the office of said first party, in Cincinnati, the same to bear interest from the first day of December, 1867, and to be issued so soon as the work is completed according to this contract and approved by the chief engineer of the party of the first part.

In testimony whereof the said Indianapolis, Cincinnati & Lafayette Railroad Company, by its committee above named, has caused its corporate seal to be affixed hereunto & the signatures of said committee annexed; and said Henry C. Lord & Benjamin E. Smith have annexed their signatures & seals this 7th day of December, 1867.

W. W. SMITH,
Vice-President,

[SEAL.] T. A. MORRIS,
L. B. LEWIS,
Committee.

Attest: A. WORTH, *Sec'y.*
H. C. LORD.
B. E. SMITH.

212 EXHIBIT "B," Referred to in Deposition of Henry Prentiss.

W. W. V. Board Meeting, July, 1869.

On motion of Mr. Farquhar, the following resolution was adopted unanimously:

Whereas the several contracts approved and adopted at a meeting of the stockholders of this company held on the 30th day of October, 1868, and recorded in pages 27 to 44, inclusive, of this volume of records, had been approved by members of this board, but, by mistake or inadvertence, had not been formally adopted, or, if adopted, no record was made thereof: Now, therefore, for the purpose of placing the intention of the board duly on record, be it—

Resolved, That this board adopt, approve, ratify, and confirm the said contracts and each one of them, viz: The contract between the Indianapolis, Cincinnati and Lafayette Railroad Company, of one part, and the White Water Valley Railroad Company, of the other part, dated November 4th, 1867, recorded pages 27 to 34, inclusive; also the contract between the Indianapolis, Cincinnati and Lafayette Railroad Company, of one part, and Henry C. Lord and Benjamin E. Smith, in behalf of the Hagerstown Association of the W. W. V. R. R. Co., of the other part, dated December 7th, 1867, recorded

pages 35 to 37, inclusive; also the contract between the Colum
213 bus and Indiana Central Railroad Company and the Chicago and Great Eastern Railroad Company, party of one part, and the Cincinnati and Indiana Railroad Company, the Indianapolis, Cincinnati and Lafayette Railroad Company, and the White Water Valley Railroad Company, party of the other part, dated November 14th, 1867, recorded pages 38 to 42, inclusive; also an additional contract between the parties to the last named, bearing the same date, recorded in pages 43 and 44; and the president is and was authorized to execute each one of said contracts under the seal of this corporation, and the execution thereof is approved and confirmed.

The president laid before the board a copy of the following resolution adopted by the board of directors of the Indianapolis, Cincinnati and Lafayette Railroad Company April 23rd, 1868, viz:

"Resolved, That the Hagerstown Association of the W. W. V. R. R. Co. and the members thereof, being the holders of the obligations or certificates issued or to be issued by the Indianapolis, Cincinnati and Lafayette Railroad Company under a contract between them and the said association dated 7th December, 1867, for the construction of the road from Cambridge City to Hagerstown, shall have a perpetual lien on the income and earnings of that section
214 & 215 of the White Water Valley railroad between Cambridge City and Hagerstown, built by that association, to secure each and all of the obligations or certificates issued or that may at any time hereafter be issued by this company pursuant to the aforesaid contract with that association, in whatever form said obligations or certificates or any renewals, substitutions, or subdivisions thereof may be issued, the same being intended in nature of a perpetual rent on said section of the road, and the president or vice-president of this company or either of them is authorized to execute or join in any proper writing under the corporate seal granting and securing such lien."

And, on motion of Mr. Farquhar, it was unanimously resolved that this company assent to, approve, and confirm said resolution and authorize and direct the president of this company, in behalf of this company and under its corporate seal, to join in any instrument of writing granting and securing such lien as is provided in said resolution of the Indianapolis, Cincinnati and Lafayette Railroad Company.

H. C. LORD, *Pres't.*

J. CHAPMAN, *Sec'y.*

216 U. S. Circuit Court, Southern District of Indiana. In Chancery.

WM. D. THOMPSON *et al.*
vs.
WHITE WATER VALLEY RAILROAD COMPANY *et al.* } No. 3311.

The defendants will take notice that on Saturday, the 15th day of November, A. D. 1879, the plaintiffs above named will take the depo-

sitions of H. C. Lord and sundry witnesses, to be used as evidence on the trial of the above cause, at the office of D. Thew Wright, No. 66 West Third street, Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and one o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

D. THEW WRIGHT,
Attorney for Plaintiffs.

Service of the above notice is acknowledged, but no objections whatever are waived.

HARRISON, HINES & MILLER,
Sol's for W. W. R. R. Co.

U. S. Circuit Court, Southern District of Indiana. In Chancery.

WM. D. THOMPSON *et al.*
vs.
WHITE WATER VALLEY R. R. Co. *et al.* } No. 3311.

217 The defendants will take notice that on Saturday, the 15th day of November, A. D. 1879, the plaintiffs above named will take the depositions of H. C. Lord and sundry witnesses, to be used as evidence on the trial of the above cause, at the office of D. Thew Wright, No. 66 West Third street, Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and one o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

D. THEW WRIGHT,
Attorney for Plaintiffs.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions in regard to time.

BAKER, HORD & HENDRICKS,
Att'ys for I., C. & L. R. R. Co.

Deposition of Henry C. Lord, taken before me, H. F. Brashear, a commissioner of the circuit court of the United States for the sixth judicial circuit and southern district of Ohio, pursuant to the annexed notices, and at the time and place therein specified, to be read on behalf of the plaintiffs in the case of Wm. D. Thompson *et al.*, pl'ffs, *vs.* The White Water Valley Railroad
218 Company *et al.*, def'ts, U. S. circuit court, southern district of Indiana, No. 3311, in chancery, D. Thew Wright being present as counsel for pl'ffs and no one as counsel for def'ts.

HENRY C. LORD, of lawful age, being by me first duly cautioned and solemnly sworn, deposes and says as follows:

Question- by D. THEW WRIGHT, att'y for complainants:

1st Q. Please state the relations you held to the Indianapolis, Cincinnati and Lafayette R. R., the Cin'ti & Indiana R. R., and the White Water Valley R. R. in 1870 and prior thereto.

Ans. I was president of the Indianapolis, Cincinnati and Lafayette R. R. Co. from the date of the consolidation of the Indianapolis, Cincinnati and Lafayette and Indianapolis Co's. Prior to that and from the year 1855 or 1856 I had been president of the former Co. I was president of the consolidated Co. up to November, 1870. I was president of the White Water Valley Co. from its original organization until early in 1871. I was president of the Indiana & Cincinnati Co. from its organization until my successor was elected, late in the year 1870.

2d Ques. Please state between whom was the contract made for building what is known as the "Hagerstown Branch" or "Extension." State what that branch or extension is and when this contract was made.

Ans. The contract was in writing and shows its date. It was
219 made between Benjamin E. Smith, of Columbus, Ohio, and myself, on the one part, and the Indianapolis, Cincinnati and Lafayette R. R. Co. and the White Water Valley R. R. Co., on the other part; was approved by the respective boards of directors of the latter as well as by a vote of their stockholders.

3rd Ques. Between what points did the W. W. V. R. R. Co. build its road, and upon what was the track laid?

Ans. Between the town of Harrison, located both in Ohio and Indiana, and the town of Cambridge City, Wayne county, Indiana. It was built mainly on the berm- bank of the White Water Valley canal, and only left it where the necessities of engineering made it necessary to do so. I identify the paper handed me, which I mark Exhibit A and to which put my signature of this date, as a true copy of the original contract between the White Water Valley Canal Company and the White Water Valley Railroad Company, under which the latter came into the right of way from Harrison to Cambridge City, Indiana.

Did the White Water Valley Railroad Company ever obtain any right of way beyond Cambridge City, Ind., for the Hagerstown Branch or Extension?

Ans. No.

Who did obtain this right of way from Cambridge City to Hagerstown?

Ans. Benj. E. Smith and myself obtained this right of way by donation or purchase for the whole distance—about eight
220 miles. Neither the Indianapolis, Cincinnati and Lafayette Railroad Company nor the White Water Valley Railroad Company ever contributed a dollar to obtain this right of way or towards the construction of the branch.

Who furnished the money and material for this Hagerstown Extension?

Ans. Mr. B. E. Smith and myself and other parties, who with us

contributed to its construction. Those parties are known as the holders of the Hagerstown certificates. The money was raised by Mr. Smith and myself upon the credit of these certificates.

Who were the trustees of the mortgage on the White Water Valley railroad for one million dollars?

Ans. William Dwight and Thomas Dwight, his brother, of Boston, and D. Thew Wright, of Cincinnati, O.

State what relation Mr. William Dwight had with the White Water Valley Railroad Company.

Ans. He was a director from the beginning. He was a director of the Indianapolis and Cincinnati Railroad Company, and he with his brother and his son, D. A. Dwight, owned a majority of the stock of the White Water Valley Railroad Company. He was also the purchaser of all its issue of bonds. Before any work upon the construction of the road was done, and even before any plans
221 for its construction were matured, William Dwight came to Cincinnati and went with me in a carriage from Cincinnati to Cambridge City, where we stopped, and returned to Cincinnati, after inspecting the whole line of the White Water Valley canal from Harrison to Cambridge City. Mr. William Dwight was one of the corporators of the White Water Valley Railroad Company and a director from its incorporation.

Was Mr. William Dwight familiar with the transactions relating to the building of the Hagerstown Branch, and did he know of the contract of Lord and Smith before it was completed and executed?

Ans. He was perfectly familiar with them. He knew all about the contract of Lord and Smith. He was a member of the board of directors of the I., C. & L. R. R. Co. and also of the W. W. V. R. R. Co. at the time. He approved the Hagerstown contract and the subsequent contracts with the Columbus, Chicago and Indiana Centaal Railroad Company.

What knowledge had the other trustees of these transactions and the building of the branch?

Ans. They had knowledge of the process of its construction; they had knowledge of the object for which it was being constructed, and of the probable benefits to result from it, both to their investment in the I., C. & L. and the W. W. V. R. R. Co's. I was frequently
222 in Boston, where I met the Messrs. Dwight, and both Mr. William Dwight and Thomas Dwight were entirely familiar with these affairs and the whole policy of the road.

HENRY C. LORD.

I, H. F. Brashear, a commissioner of the circuit court of the United States, southern district of Ohio, do hereby certify that Henry C. Lord was by me first sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by myself, except as to the answers to the first and second questions, which were written by witness himself in my presence, in the presence of the witness, and was subscribed by the said witness in my presence,

and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand this 15th day of November, A. D. 1879.

H. F. BRASHEAR,
U. S. Commissioner for Sixth Judicial Circuit and Southern District of Ohio.

223 STATE OF INDIANA:

United States Circuit Court, District of Indiana.

WILLIAM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY and The Indianapolis, Cincinnati and Lafayette Railroad Company. } No. 3311.

The defendants will take notice that on Saturday, the 21st day of September, A. D. 1878, the plaintiffs above-named will take the depositions of D. Thew Wright, M. E. Ingalls, and sundry witnesses, to be used as evidence on the trial of the above cause, at the office of Sam'l R. Matthews, room No. 58, Johnston building, southwest corner 5th and Walnut streets, in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

SAMUEL R. MATTHEWS &
MATTHEWS, RAMSEY & MATTHEWS,
Attorneys for Plaintiffs.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions in regard to time.

HARRISON, HINES & MILLER,
Att'ys for White Water Valley R. R. Co.
BAKER, HORD & HENDRICKS,
Att'ys for I., C. & L. R. R. Co.

224 STATE OF INDIANA:

United States Circuit Court, District of Indiana.

WILLIAM D. THOMPSON *et al.*
vs.
WHITE WATER VALLEY RAILROAD COMPANY and THE Indianapolis, Cincinnati and Lafayette Railroad Company. } No. 3311.

The defendants will take notice that on Saturday, the 21st day of September, A. D. 1878, the plaintiffs above named will take the

depositions of D. Thew Wright and M. E. Ingalls and sundry witnesses, to be used as evidence on the trial of the above cause, at the office of Sam'l R. Matthews, room No. 58, Johnston building, on the southwest corner of 5th and Walnut streets, in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

SAM'L R. MATTHEWS AND
MATTHEWS, RAMSEY & MATTHEWS,
Attorneys for Plaintiff.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said deposition may be taken is by agreement waived; also all exceptions in regard to time.

225 STATE OF OHIO, }
Hamilton County, } *ss:*

Samuel R. Matthews, being duly sworn, says he served the within notice on E. A. Ferguson, of counsel for the White Water Valley R. R. Co., one of the within-named defendants, by leaving a copy thereof at his office, with the clerk in charge thereof, on Tuesday, the 17th September, 1878, at 9½ o'clock a. m.

SAM'L R. MATTHEWS.

Signed in my presence and sworn before me this 23d September, 1878.

[SEAL.] W. M. TREVOR,
Notary Public for Hamilton County, Ohio.

Depositions of D. Thew Wright and M. E. Ingalls taken before me, William M. Trevor, a notary public within and for the county of Hamilton, in the State of Ohio, pursuant to the annexed notices and at the time and place therein specified, to be read in evidence on behalf of the complainants in an action pending in the circuit court of the United States within and for the district of Indiana, in which William D. Thompson and others are complainants and The White Water Valley Railroad Company and others are defendants, Samuel R. Matthews, Esq., being present on behalf of complainants and no one on behalf of defendants.

D. THEW WRIGHT, of lawful age, being by me first duly sworn, deposes and saith as follows:

226 Exhibits No. 2 (to answer of I., C. & L. R. R.) attached to to my deposition, is a copy of what is known as the agreement of April 25th, A. D. 1871, executed in behalf of the C., I. & I., C. & L. R. R. by Geo. Hoadley, att'y; by Chapman Dwight, superintendent and agent W. W. V Co., and Rufus King, att'y for same;

and the Harrison Branch Co., by A. W. Hendricks, att'y. Having been familiar with the document for many years, I know this to be a correct copy.

D. THEW WRIGHT.

The further taking of these depositions is adjourned until Monday, September 23rd, 1878, at the place and between the hours named in the notice annexed to the depositions.

W. M. TREVOR,
Notary Public.

And now on this, Monday, the 23rd day of September, 1878, the further taking of the depositions mentioned in the notice hereto annexed was resumed at the same place and between the same hours.

M. E. INGALLS, being by me first duly sworn, deposes and saith as follows:

I am receiver of the Indianapolis, Cincinnati and Lafayette railroad, and have been president and receiver since 1870. I am familiar with the negotiations which took place between the I., C. & L. and White Water Valley Railroad Company which resulted in the cancellation of the so-called lease of the latter company to the I., C. & L. Company. The agreement of cancellation and
227 final settlement was dated the 25th of April, 1871. Subsequent to the date of that agreement—that is, October, 1871—I received a letter from Chapman Dwight, vice-president of W. W. V. R. R. Co., and approved by William Dwight, president of the said company, dated October 27th, 1871, the original of which I now here produce to the notary that he may take it and annex it to my deposition as Exhibit A to M. E. Ingalls' deposition.

M. E. INGALLS.

THE STATE OF OHIO, }
County of Hamilton, } *ss:*

I, William M. Trevor, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named D. Thew Wright and M. E. Ingalls were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth in the cause above named, and that the depositions by them subscribed as above set forth were reduced to writing—as to the deposition of the said D. Thew Wright, by himself in my presence, and as to that of the said M. E. Ingalls by myself in the presence of the said witness—and were subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notices specified, and were continued from day to day as above set forth; that I am not counsel or attorney or relative of either party or otherwise interested in the event of this suit.
228 In testimony whereof I have hereunto set my hand and official seal this 23rd day of September, A. D. 1878.

[SEAL.] WILLIAM M. TREVOR,
Notary Public in and for Hamilton County, Ohio.

STATE OF OHIO, }
Hamilton County, } ss:

I, Louis G. Bernard, clerk of the court of common pleas within and for said county of Hamilton, do hereby certify that William M. Trevor, whose name is signed to the certificate attached to the annexed depositions, was at the time of taking and at the time of subscribing the same a legally acting notary public in and for said county of Hamilton, duly commissioned and qualified, and that I am well acquainted with his handwriting and believe his said signature to be genuine, and that he is authorized thereto.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 24th day of Sept., A. D. 1878.

[SEAL.]

LEWIS G. BERNARD,
Clerk H. C. C. P. O.,
By EMIL HUFFMAN, *Deputy.*

EXHIBIT in D. T. Wright's Deposition, No. 2, to Answer of I., C. R. R

229 Memorandum of agreement made this 25th April, A. D. 1871, between the Cincinnati & Indiana Railroad Company, of the first part; the Indianapolis, Cincinnati & Lafayette Railroad Company, of the second part; the White Water Valley Railroad Company, of the third part, and the Harrison Branch Company, of the fourth part, witnesseth:

Exhibit to D. Thew Wright's deposition. W. M. Trevor, notary public.

That, to effect a compromise of the controversy now pending between said first and second parties, on one part and said fourth party, on the other part, in the suit, No. 36199 in the common pleas of Hamilton county, Ohio, and to form a perfect connection and running arrangement between all said parties, it is mutually agreed as follows:

1. Said fourth party shall immediately become incorporated by taking proper measures for that end under the general railroad laws of Ohio.

2. Immediately thereupon the said first part- shall convey and seover to the fourth party so incorporated all the said Harrison Branch railroad, and all the rights, privileges, and appurtenances appertaining to it as the assignees of Dwight and Lord, made on the 21st July, 1863; to have and to hold the same to said fourth party so incorporated, their successors and assigns, forever.

Exhibit to D. Thew Wright's deposition and identified by Osborne as Exhibit "H." Wm. B. Burnet, spec. ex.

3. Immediately upon the execution of said conveyance and transfer said fourth party shall lease the said Harrison Branch to
230 the third party for the term of ninety-nine years, renewable forever, reserving a yearly rent of sixteen thousand dollars ($16,000), bearing eight per cent. per annum, upon the entire capital of said fourth party, and to be paid semi-annually, from and after May

1st, A. D. 1871, at Cincinnati, to the stockholders therein, in which case, besides payment of said rent or dividends and of all taxes and duties levied or assessed upon said Harrison Branch railroad or upon the capital stock of said fourth party, the said third party shall also be bound at all times to keep said Harrison Branch railroad thoroughly renewed and repaired and to suffer no waste or deterioration, and also, on behalf of said fourth party, to perform and keep up the connection and running arrangement hereinafter provided, and to indemnify said fourth party against any and all damages or liability whatsoever in respect to the operating of said railroad, with an express condition that if said third party fail to pay or perform either of said stipulations, then in any such case it shall be lawful for said fourth party, their successors or assigns, subject to and keeping the running arrangements herein provided, to re-enter and take possession of said Harrison Branch and every part and appurtenance thereof, and to have and take all the earnings therefrom
231 and to apply the same to fulfill and secure all and every the stipulations and conditions of such lease, which lease shall continue, nevertheless, in full force and obligation against said third party notwithstanding such temporary dispossession, and such dispossession shall continue until said third party make full amends for any such default, or said fourth party, their successors and assigns, may for any such violation wholly forfeit said lease, first giving thirty days' previous notice in writing to the third party.

4. The said second party shall ratify and confirm said conveyance by the first party to the fourth and lease by the fourth to the third.

5. The second party operating thereon and the railroad of the first party and the third party intending to operate thereon and the railroad of the fourth party so to be conveyed and leased shall and will enter into an arrangement for operating said ten lines in connection so that all the business of said third and fourth parties into and out of Cincinnati shall be run over the railroad of said first and second parties upon such terms as said second and third parties from time to time shall agree, or if at any time they disagree, then upon such terms as shall be settled by disinterested referees experienced
232 in operating railroads, one to be chosen by the second party, one by the third party, and the third or umpire by the two so chosen, and — *two of* them or any two of them in writing shall be conclusive.

6. In consideration of the release by the third and fourth parties of all claims and demands whatever upon the first and second parties or either of them to the 1st of May, A. D. 1871, the said second party hereby sell, assign, and set over to the third party all the chattels and supplies of every sort on the line of the roads of said third and fourth parties, a schedule of which has been exhibited and is now in the hands of Moore, the superintendent of the Indianapolis, Cincinnati and Lafayette railroad, and to be produced for reference; also the claim of said second party against a certain hydraulic company on the line of the White Water Valley railroad for excavations, hauling, and services done for said hydraulic company, with full power to sue and recover the same, said second party to do all

such further or other acts, but at the sole expense of said third party, as are necessary to enable said third party to recover and collect the same, and also to supply the said third party until the 1st of August next, without charge, all the rolling stock necessary and proper to enable said third party to do all the business over
233 the roads of said third or fourth parties, and to keep said rolling stock fully repaired against ordinary wear and tear, but not against any extraordinary injuries occasioned by accident or fault of said 3rd party, and said second party shall also pay said third party, upon the completion of this agreement on its part, ten thousand dollars in cash, which shall be a full and final settlement of all claims or dividends as well *as* of the said third and fourth parties on the one part as of said first and second parties on the other; and the said fourth party, in consideration of the said dividend of eight per cent. per annum to be guaranteed and secured to their stockholders by said third party and of the other stipulations to be expressed in said loan, relinquish to said third party all the chattels, supplies, claims against the hydraulic company, and cash so agreed to be delivered and paid to them by the second party.

7. The second party shall execute to the third party a loan for 99 years, renewable forever, of their branch extending from Cambridge to Hagerstown, in Indiana, known as the Hagerstown Branch, for which a rent of $6,150, — is their per cent. upon the certificates of the Hagerstown Association, shall be paid to the stockholders herein at Cincinnati, if they will accept said rental, but in case said
234 association refuses to accept it in full on the outstanding certificates, then said third party shall release and convey said railroad to the second party.

8. The said second party shall secure the concurrence of the receivers and the approval of the courts in Indiana and Ohio to the foregoing articles by application in the suits, and these articles shall thereupon be carrid out and executed by each party without delay.

9. The second party shall pay said third party $2,000 in cash for the deficiency in the quantity of fire-wood stated in schedule mentioned in article 6 instead of replacing such quantity.

C., I. & I., C., L. RAILROAD CO.
By GEO. HOADLEY, *Attorney.*
CHAPMAN DWIGHT,
Sup't & Ag't W. W. V. Co.
RUFUS KING, *Att'y for Same.*
THE HARRISON BRANCH CO.,
Per A. W. HENDRICKS,
Att'y, as per Authority Annexed.

CINCINNATI, *May* —, 187–.

A. W. Hendricks, att'y:

Sign the agreement in behalf of Harrison Branch Co.

S. JONATHAN CHAPMAN,
Gen'l Ag't.

RUFUS KING, *Att'y.*
WILLIAM DWIGHT.

235 EXHIBIT "A" to M. E. Ingalls' Deposition. W. M. Trevor, Notary Public.

CINCINNATI, *Oct. 27th*, 1871.

M. E. Ingalls, receiver.

DEAR SIR: The agreement last April for a lease of the Hagerstown Branch by the I., C. & L. Railroad Co. to the W. W. Valley R. R. Co. was subject to a proviso that the stockholders of the Hagerstown Association should accept the rent ($150) fixed by the agreement. If they refused to accept it, then the Hagerstown Branch was to be returned to the I., C. & L. Co. My object is to call your attention to the fact that the stockholders of that association have not yet signified their assent, and to say that unless they do give their assent very soon the White Water Valley R. R. Co. will return the Hagerstown Branch to the I., C. & L. Co.

The necessity of thus notifying you and requiring the Hagerstown Association to decide one way or the other arises from certain claims against the Hagerstown Branch which have been presented to the W. W. Valley Company, and which, if paid or allowed by the latter, must come out of the rent, not being obligations upon the W. W. Valley Co., but debts which the Hagerstown Association or the I., C. & L. Co. contracted and should cancel.

The claims here particularly referred to are for the taxes
236 for 1870, also for a bridge over the branch at Cambridge City which the city authorities built some time ago, and for leaving the road unfenced along the line, which should have been done according to an agreement made by the association to secure a right of way.

I will thank you to obtain a definite and written decision by the Hagerstown Branch Association and their stockholders whether they accept or not and favor me with an early answer.

CHAPMAN DWIGHT,
Vice-President.

Approved:
WILLIAM DWIGHT,
Pres't of W. W. V. R. R. Co.

THE STATE OF INDIANA, } *ss:*
Marion County, }

In the Circuit Court of the United States for the District of Indiana.
November Term, 1874. In Chancery.

WILLIAM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY *et al.* } 3311.

The defendants in the above-entitled cause are hereby notified

that on the 26th day of September, 1874, at the president's office of the Indianapolis, Cincinnati and Lafayette R. R. Co., corner Pearl St. and Central avenue, in the city of Cincinnati, in the county of
237 Hamilton and State of Ohio, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day, before some officer authorized to take depositions, the plaintiff- will proceed to take the depositions of witnesses to be in evidence on the trial of said cause, and will, if necessary, continue said taking from day to day until said depositions are completed.

Dated this 23rd day of September, 1874.

D. THEW WRIGHT AND
McDONALD & BUTLER,
Attorney- for Plaintiffs.

We acknowledge service of the above notice and waive dedimus this 23rd day of September, 1874.

HARRISON & HINES,
Attorneys for the White Water Valley Railroad Company.

Deposition of Edward F. Osborne, a witness produced and sworn *to* before me, H. F. Brashear, a United States commissioner for the southern district of Ohio, at the president's office of the I., C. & L. R. R. Co., corner Pearl St. and Cent. avenue, in Cincinnati, Hamilton county, Ohio, in said district, pursuant to annexed notice.

This deposition was taken on behalf of plaintiff- in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein W. D. Thompson *et al.* are plaintiffs and The White Water Valley R. R. Co. are defendants.

238 The said EDWARD F. OSBORNE, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposeth as follows:

Question 1. Please state your name, age, residence, and occupation.

Ans. My name is Edward F. Osborne; am 33 years of age; residence, Southside, Hamilton county, Ohio. I am treasurer of the Indianapolis, Cincinnati & Lafayette R. R. Co. and sec'y of the Cincinnati & Indiana R. R. Co.

Examination adjourned to Monday, Sept. 28, 1874, at 2.30 p. m.

H. F. BRASHEAR.

MONDAY, *Sept.* 28, '74, at 2.30 p. m.

Examination resumed:

Question 2. In whose office and custody are books and records of the I., C. & L. R. R. and C. & I. R. R. Co's?

Ans. In the treasurer's office and in his custody.

3. Look at paper now shown you, marked Exhibit "A" and hereto attached, and say what it is.

Ans. It is a copy of the lease of the White Water Valley Railroad Company to the I., C. & L. R. R. Co., dated Nov. 4, 1867. It is a true copy of the original, which is in my office.

4. Please look at Exhibit "B," hereto attached and made part hereof, and state what same is.

239 Ans. First is a resolution of the board of directors of the I., C. & L. R. R., session at Morris, Dec. 6, 1867. Then follows an instrument, dated December 7, 1867, between the I., C. & L. R. R. of the one part and Henry C. Lord and Benjamin E. Smith of the other; next, resolution of board of directors of the I., C. & L. R. R., dated May 11, 1868, for the issue of one hundred thousand Hagerstown certificates; next, a resolution of the same board, at Lawrenceburg, 21st July, for the issue of the residue of said certificates; next, extract from the minutes of said board, 18 January, 1868, for the issue of seventy-five thousand of said certificates.

5. Please examine paper marked Exhibit "C," hereto attached and made part hereof, and state what it is.

Ans. The same is the form of paper known as the Hagerstown certificate.

—. Please look at paper hereto attached marked "D" and state what same is.

Ans. First is resolution of the I., C. & L. board, April 23, 1868, giving the Hagerstown lien; next, an agreement, dated 24th of April, 1868, between the I., C. & L. R. R. and the White Water Valley R. R., party of the first part, and Lord and Smith, trustees, of the second part. This paper appears to have been acknowledged before W. T. Boaz, notary public; next, *to* an agreement, 24 April, 1868, between the same parties without acknowledgement;

240 next is an agreement, 28 April, 1868, between the I., C. & L. R. R., of the first part, and Lord & Smith, trustees, acknowledged before W. T. Boaz, notary public, 20 November, 1868, by the I., C. & L. R. R., per W. W. Smith, vice-president, and acknowledged by Smith 12th December, 1868. The originals are in this office.

Ques. 6. Please look at paper "E," one of the exhibits attached to the original bill in this case, and say what it is.

Ans. The same is a copy of paper dated 26th January, 1871, the original of which is in this office, and which is known as the cancellation of the White Water Valley lease, executed by Wm. Dwight for the White Water Valley R. R. and M. E. Ingalls for the I., C. & L. R. R.

Ques. 7. Please look at paper "F" and say what it is.

Ans. It is an extract from the records of the stockholders' meeting of the I., C. & L. R. R., dated 2nd of November, 1868, and 11 June, 1868.

Ques. 8. Please append hereto a list of the stockholders of the Hagerstown Association.

Ans. Paper "G" is such statement.

Ques. 9. Please look at paper marked "H" and state what same is.

Ans. The same is copy of agreement, April 25, 1871, between the I., C. & L. R. R. and the C. & I. R. R. and the White Water Valley R. R.

EDWARD F. OSBORN.

241 UNITED STATES OF AMERICA.

THE STATE OF OHIO,
County of Hamilton, Southern District of Ohio:

I, H. F. Brashear, a commissioner of the circuit court of the United States within and for the southern district of Ohio, duly appointed, qualified, and commissioned and acting as such, and duly authorized under and by virtue of the laws of the United States to take depositions to be used in the courts of the United States, do hereby certify that the above-named Edward F. Osborn, was by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth relating to said cause; that deponent's testimony was reduced to writing by me; that the White Water Valley R. R. Company, by their attorney, N. Longworth, Esq., attended, and said deposition was taken at the president's office of the Ind., Cin't. & Lafayette R. R., as set out in notice, cor. Pearl — and Central avenue, in Cincinnati, county of Hamilton and State of Ohio, on the 26th day of September, 1874, bet. the hours of 8 a. m. & 6 p. m., and continued, between same hours, to Monday, Sept. 28, 1874.

In testimony whereof I have set my hand this 28th day of Sept., 1874.

H. F. BRASHEAR,
U. S. Commissioner for the Southern District of Ohio.

242 EXHIBIT "A."

Contract of I., C. & L. R. R. Co. with White Water Valley R. R. Co.

This agreement, made and entered into this fourth day of November, 1867, by and between the Indianapolis, Cincinnati and Lafayette Railroad Company, party of the first part, and the White Water Valley Railroad Company, party of the second part, both being corporations organized under the laws of the State of Indiana, witnesseth:

Exhibit "A," referred to in deposition of Edward F. Osborn. H. F. Brashear, U. S. com.

That whereas said party of the first part is possessed in part as owner and in part under certain contracts with the Cincinnati and Indiana Railroad Company of a certain line of railroad extending from Lafayette, in the State of Indiana, to the city of Cincinnati, in Ohio, with a branch in the State of Ohio, which at the town of Harrison connects with the railroad of the party of the second part, which said line of railroad, composed of a main line in Indiana, with an extension into and a branch line in Ohio, said party of the first part is now operating and transacting business upon;

Exhibit "A," referred to in E. F. Osborne's & H. C. Lord's depositions. Wm. B. Burnet, special examiner.

And whereas said party of the second part owns a line of railroad from said Harrison to Hagerstown, in Indiana, which is not yet completed beyond Cam-

bridge City, but it is its desire to complete to Hagerstown, but is without means to do so, and its said line of railroad is encumbered by a mortgage for one million of dollars and interest and, being
243 without equipment or resources to procure the same, it is unable to operate its said road or without aid to pay such interest as the same shall semi-annually become due, and it is thus in danger of forfeiting its charter and losing its property; and whereas, to enable said railroad of said party of the second part to be completed to Hagerstown, and to be maintained, operated, and used as the law of the land and the convenience of the public require, said parties desire to enter into a perpetual running arrangement whereby the interests of both and of the public may be promoted:

Now, therefore, to the end aforesaid, said parties have agreed and do agree—

1st. That the party of the second part have placed the party of the first part in possession of their railroad aforesaid, granting them the right perpetually to use and operate the same, viz., from said Harrison to Hagerstown, and do hereby covenant and agree forever to maintain said party of the first part in the quiet and peac-able possession and use of said railroad, including the lands, rights of way, bridges, culverts, track sidings, station-houses, water-tanks and stations, machine and car shops and fixtures, and other property, real and personal, rights, privileges, and franchises thereof or thereunto appurtenant, from Harrison to Hagerstown, and of
244 every part and parcel of the same, and will warrant and defend the same against the claims of all persons claiming under said mortgage, and of all other persons whomsoever lawfully claiming.

The above description of property is, it is hereby agreed, to be understood to include all rights of the party of the second part, and every species of interest it has acquired, whether by contract with or conveyance from the White Water Valley Canal Company or otherwise, in and to the estate and property, rights, and interests which were of the said last-named company or are or were in the White Water Valley canal, its towing paths, berme bank, locks or hydraulic or water power therewith connected or other appurtenances thereof.

2nd. In consideration of the premises and for the purpose aforesaid, and so as to make a permanent business connection between said railroads at the town of Harrison, and so to extend the business of the party of the second part into the State of Ohio and to the city of Cincinnati, for the better accommodation of the public, and to secure the prompt and economical equipment of said last-named party and bring its road into immediate and beneficial use, the said party of the first part doth hereby covenant and agree to and with the party of the second part, its successors and lawful assigns, that it will place upon said rail-
245 road of the party of the second part and will forever maintain thereon an ample and sufficient equipment to do all the business that may offer; that it will forever maintain said line of railroad, including tracks, sidings, depots, station-houses, water-tanks, and stations, machine and car shops, road-bed and superstructure,

and all the appurtenances thereof in complete order and repair for safe and constant use as a first-class railroad, and will manage and operate the same well and faithfully for the accommodation and safety of the public, and will forever permit those doing business thereon all the advantage of commerce with the city of Cincinnati and other places by a close connection with the trains of said party of the first part running to and from Harrison and within the State of Ohio, or by running, at the option of said party of the first part, the same train or trains in both said States, and will discharge forever, in the management and operation of said railroad and said extension, when completed, all the duties and services which the party of the second part is required by law to do and perform; and, further, that said party of the first part will hold and save said party of the second part harmless, and will indemnify it against all
claims for damages growing out of any act of omission of
246 said party of the first part, its officers, agents, and servants,
in the operation and management of said railroad or in the maintenance and repair thereof, and will pay quarterly, in equal installments of thirty-five thousand dollars each, to the party of the second part, the annual sum of one hundred and forty thousand dollars, such payments to be made on the first day of March, June, September, and December in each year, in the lawful currency of the United States: Provided, That whereas the party of the first part has guaranteed the payment of the coupons or interest warrants, at the rate of eight per cent. per annum, on the bonds of the party of the second part secured by said mortgage to the amount of one million of dollars, to secure the payment of which said party of the second part has provided for the creation of a sinking fund to the amount of fifteen thousand dollars per year, to be invested in said bonds or otherwise, under the charge of the trustees named in said mortgage: Now, upon payment of any such interest warrants or coupons or any other interest warrants or coupons of said party of the second part which said party of the first part may hereafter at any time hereafter guarantee or agree to pay, the amount of any such interest
warrants or coupons so paid shall be credited by said party of the
247 second part, upon surrender of the same to be cancelled, upon
any installment or installments then due or next to become due thereafter of said annual payment; and said party of the first part shall always be entitled to discharge thus to that extent its covenant herein with respect to said annual payment of one hundred and forty thousand dollars by payment of any such coupons or interest warrants as the same shall severally mature; and the party of the second part covenants with the party of the first part that said annual sum of fifteen thousand dollars shall be punctually applied for the purpose of a sinking fund, pursuant to the terms of said mortgage; and in the event that said party of the second part, or the trustees named in its said mortgage, shall at any time fail in any duty which either has assumed to discharge with reference to said sinking fund by not appropriating said annual sum or any part thereof for the purpose of said fund, or not investing or using the same as said mortgage both prescribed and pro-

vided, then and from thenceforth said party of the first part shall have the right from time to time and at any time to retain such part of said annual sum of one hundred and forty thousand dollars as may be required to make up the amount then due to or
248 not effectually applied for said sinking fund, applying the same without delay in purchase of said bonds of the second party at the rates to be approved by said trustees; or, if that cannot be done, then in purchase of such other securities as said trustees shall approve, such bonds to be cancelled and kept pursuant to such mortgage and such other securities so held as will ensure their faithful application to the reduction of the mortgage; and for the amounts so retained and applied said party of the first part shall receive credit from said party of the second part upon the installment or installments of said annual sum of one hundred and forty thousand dollars then next to become due and payable, or that may already have accrued and matured, and that said party of the first part will forever also pay and discharge all taxes and assessments—national, State, county, municipal, or others—that may be charged or assessed upon or on account of said railroad and its appurtenances or the business or traffic that may be done thereon, not including, however, the income tax that may be charged upon the income paid by said party of the first part to said party of the second part, or upon the coupons and interest warrants aforesaid, or upon any dividends upon the capital stock of said party of the second part.

249 3rd. And should said party of the first part fail in any respect to keep its covenants herein or any of them or to make such payments or any part thereof, then said party of the second part may demand and receive possession of its said railroad and appurtenances as hereinbefore described, and thereafter may use and operate the same on its own account and for its own profit.

4th. And further, in consideration of the premises and inasmuch as the railroad is not constructed and finished from Cambridge City to Hagerstown and the second party is without the means of finishing it promptly, it is mutually agreed that said first party shall cause that portion of the road to be constructed and finished under the charter of the second party, at the cost and expense of said first party, and put in good and safe running order for the accommodation of the public, and shall be entitled to all the profits, income, and earnings of the same perpetually, which are hereby guaranteed to said first party and its assigns, in case it completes the construction of said portion of road, and in that case no further compensation is to be paid to the second party on account of said portion, and said first party may adopt any reasonable plan and employ
250 any suitable persons it may deem proper for such construction, and the parties so constructing the same, their agents and employees, shall have the right and authority to use the same and the corporate powers, privileges, and franchise of the second party in any proper manner in constructing the road, procuring right of way, or for any other proper purpose, said first party, however, agreeing to indemnify the second party against all claims for damages growing out of any act or omission in the course of said

construction, and said second party shall make no claim for any rights or interest in the old canal, if any it has, which may be used or occupied in such construction, and said first party and its assigns are to have the benefit of all contributions or donations made or which may be made hereafter for the construction of said portion of road.

It is agreed that the time of the acceptance of the entire railroad and the date from which the annual payment of the rent begins is the fourth day of November, eighteen hundred and sixty-seven, so that the first quarterly payment of thirty-five thousand dollars will be due in full on the first day of March, eighteen hundred and sixty-eight, and the fraction of a quarter accrued before the first day of December is to be paid at the same time.

251 In testimony whereof the said Indianapolis, Cincinnati and Lafayette Railroad Co., by their vice-president, W. W. Smith, and T. A. Morris and L. B. Lewis, a committee duly appointed by the board of directors for that purpose, and the White Water Valley Railroad Company, by their president, Henry C. Lord, and secretary, Jno. Chapman, have caused their respective corporate seals to be hereunto affixed and their respective signatures annexed this fourth day of November, in the year eighteen hundred and sixty-seven.

THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD CO.,
By W. W. SMITH, *Vice-President,*
T. A. MORRIS,
L. B. LEWIS,
Committee.
THE WHITE WATER VALLEY R. R CO.,
By H. C. LORD, *President.*
JNO. CHAPMAN, *Sec'y.*
Attest: A. WORTH, *Sec'y I., C. & L. R. R.*

EXHIBIT "B."

Session at Morris, December 6th, 1867.

The following resolution was also adopted, to wit:

252 Resolved, That this board consider it of great importance to our business to secure the immediate construction and completion of the railroad from Cambridge City to Hagerstown, which, by said contract with the White Water Valley Railroad Company, is left for this company to construct, at the same time it is desirable that this company should not incur the expense of the construction, especially in the present stringent state of the money market; therefore resolved, further, for the purpose of raising funds for such construction, that the vice-presidents, T. A. Morris and L. B. Lewis, be a committee to contract with H. C. Lord and Benjamin E. Smith and their associates for the construction of said road from Cambridge City to Hagerstown, with

Exhibit "B," referred to in deposition of Ed. F. Osborn. H. F. Brashear, U. S. com'r.

authority, to bind this company in payment for such construction, to issue irredeemable stock certificates or obligations in such form and tenor and to such amounts as said committee shall agree, binding this company to pay perpetually to the holders thereof an annual income or interest thereon to an amount not exceeding in the aggregate on all the certificates to be issued the annual sum which would have been payable to the White Water Valley Railroad Company under the original agreement had she constructed the same—that is to say, not exceeding the rate of rent per mile payable to her for the rest of the road—such interest or income to be payable semi-annually, at such time and place as said committee may agree, and this company will issue such certificates in such form and tenor and at such times as said committee shall agree.

Exhibit B, referred to in deposition of H. C. Lord. Wm. B. Burnet, special examiner.

253

Memorandum of an agreement made this seventh day of December, in the year 1867, between the Indianapolis, Cincinnati and Lafayette Railroad Company, by their committee, W. W. Smith, vice-president, and T. A. Morris and L. B. Lewis, duly appointed and authorized for that purpose by the board of directors of that company, party of the first part, and Henry C. Lord and Benjamin E. Smith, acting in behalf of themselves and their associates under the name of the Hagerstown Association of the White Water Valley railroad, being an association formed for the construction and completion of said White Water Valley railroad from Cambridge City to Hagerstown, party of the second part, as follows:

Whereas by agreement between the party of the first part and the White Water Valley Railroad Company said last-named company has granted to said first party the perpetual use and possession of its railroad from Harrison to Hagerstown, which now is in possession and use of said first party; and whereas the part of said road between Cambridge City and Hagerstown has not been constructed by said White Water Valley Railroad Company, and by said agreement the party of the first part has the right to cause the same to be constructed under the charter of said White Water Valley Railroad Company, and to make any reasonable contract with others for the construction of the same, and to apply and pay the additional rent or compensation which would have been due to said White Water Valley Railroad Company, if she had finished the road, to any other party who should construct said unfinished portion of the road:

254

Now, therefore, it is mutually agreed between the parties hereto that said second party will construct and finish said railroad from Cambridge City, and connecting therewith the railroad as already finished to Hagerstown, connecting therewith the Chicago and Great Eastern railroad, and will finish the same in a good and substantial manner as a first-class railroad, providing all requisite rights of way, grounds, and materials, with all necessary side tracks, depots, water stations, turn-tables, cattle-guards, culverts, bridges, and all

other appendages and structures requisite to a first-class railroad; the iron rails to be of good quality, weighing not less than
255 fifty-five pounds to the yard; the cross-ties to be of a length and size usual on first-class railroads and not less than twenty-four hundred to the mile; the culverts and cattle-guards to be of good masonry, the road well ballasted, and the whole well finished as a first-class railroad, ready for use on or before the first day of April next, and so far built that it can be used temporarily as soon as the weather will permit; and said first party is to furnish without charge any rights of way or other conveniences for construction, if any such she should have or control, along the portion of the road to be constructed; and said second party is to have the entire benefit of all such subscriptions or donations which have been made or may hereafter be made for the construction of said portion of the road; and said first party is to furnish all reasonable facilities and conveniences for doing the work; and in payment for said construction said first party agrees to issue to said second party or to such persons as they may direct, and in such sums or amounts as they may desire, the obligations of said first party, divisible into shares of one hundred dollars each, transferable only on the books of said first party, to the aggregate amount of two hundred and five thousand dollars, said obligations to be irredeemable, but binding said first
256 party to pay to the holders thereof forever an annual interest of eight per cent. per annum, payable semi-annually on the first days of June and December of each year, at the office of said first party, in Cincinnati, the same to bear interest from the first day of December, 1867, and to be issued as soon as the work is completed according to the contract and approval by the chief engineer of the party of the first part.

In testimony whereof the said Indianapolis, Cincinnati and Lafayette Railroad Company, by its committee above named, has caused its corporate seal to be affixed hereunto and the signatures of said committee annexed, and said Henry C. Lord and Benjamin E. Smith have annexed their signatures and seals this seventh day of December, 1867.

W. W. SMITH,
Vice-President,
T. A. MORRIS,
L. B. LEWIS,
Committee.

[Seal Indianapolis, Cincinnati & Lafayette R. R. Co.]

Attest:
A. WORTH, *Sec't.*
H. C. LORD,
B. E. SMITH.

257 EXHIBIT B—Continued. W. B. B., Spec. Ex.

Issue of Certificates to Amount of $100,000.

The board of directors of Indianapolis, Cincinnati and Lafayette Railroad Company met at Lawrenceburg on Monday, May the 11th, 1868, pursuant to a notice and call of the president.

On motion of General Morris, seconded by Mr. Wright, the following preamble and resolution were adopted:

Whereas the Hagerstown Association of the W. W. V. R. R. has nearly completed the construction of the railroad from Cambridge City to Hagerstown pursuant to their contract: Therefore,

Ordered, That certificates be issued on request, pursuant to the contract with that association, to an amount not exceeding one hundred thousand dollars, in addition to the amount heretofore authorized.

Issue of Residue of Certificates.

The board of directors of the Indianapolis, Cincinnati & Lafayette Railroad Company met at Lawrenceburg on Tuesday, the 21st day of July, pursuant to notice and call of the president.

On motion of Mr. Smith, seconded by Mr. Lewis,

Resolved, That the residue of the stock of the Hagerstown Association of the W. W. V. R. R. be issued pursuant to the contract, that association having completed the road from Cambridge City to Hagerstown.

258 *Issue of Certificates to Amount of* $75,000.

Minutes of the proceedings of the board of directors of the Indianapolis, Cincinnati and Lafayette Railroad Company at their meeting, held pursuant to notice and call of the president, at Lawrenceburg, on the 18th day of January, 1868.

On motion of Mr. Lewis, seconded by Mr. Smith, the following preamble and resolution were adopted:

Whereas it appears that the work on the completion of the White Water Valley railroad from Cambridge City to Hagerstown has so far progressed as to render the completion of the same reasonably certain, and Mr. Lord, in behalf of the Hagerstown Association, who are constructing the same under their contract with this company, suggests to the board that the association would be accommodated by the issue of $75,000 of the certificates of this company provided for in the contract, to aid them in raising funds for the completion of the work: Therefore,

Exhibit B—continued.
W. B. B., spec. ex.

Resolved, That such certificates, to an amount not exceeding $75,000, be issued forthwith on the request of the said association.

259 EXHIBIT "C," Referred to in Deposition of Ed. F. Osborne. H. F. Brashear, U. S. Com. W. B. Burnet, Special Examiner.

No. —. — shares.

STATE OF INDIANA.

Indianapolis, Cincinnati and Lafayette Railroad Co.
Capital stock, $205,000; shares, $100 each.
Hagerstown Association of the W. W. V. R. R.

This certifies that —— —— is the owner of — shares of one

hundred dollars each of the capital stock of the Hagerstown Association of the W. W. V. R. R., advanced at the instance of the Indianapolis, Cincinnati and Lafayette Railroad Company, lessees of the White Water Valley railroad, for the completion of said railroad from Cambridge City to Hagerstown; and said Indianapolis, Cincinnati & Lafayette Railroad Company bind themselves to pay perpetually to the holders of said stock an annual interest of eight per cent. per annum thereon, payable semi-annually on the first days of June and December in each year, at their office, in Cincinnati, the principal of said sum being irredeemable and said stock being transferable only on the books of said company on surrender of this certificate.

In testimony whereof the said Indianapolis, Cincinnati &
260 Lafayette Railroad Company have caused their corporate seal to be hereunto affixed and the signature of their president and secretary annexed this — day of ——, eighteen hundred and ——.

—— ——, *Pres't.*
—— ——, *Sec'y.*

Certificate No. —.
From —— ——.
To —— ——.
For —— shares.
Dated —— —, 18—.

Received of —— ——, secretary, the above-described certificate of stock in the Hagerstown Association of the W. W. V. R. R., —— —, 18—.

EXHIBIT "D."

Holders of Certificates to Have a Perpetual Lien.

The board of directors of the Indianapolis, Cincinnati and Lafayette Railroad Company met at Lawrenceburg April 23rd, 1868, pursuant to call of president.

On motion of Mr. Wright, seconded by Mr. Lewis, the following resolution was adopted, to wit:

Exhibit "D," referred to in deposition of Ed. F. Osborn. H. F. Brashear, U. S. com.

Resolved, That the Hagerstown Association of the White Water Valley Railroad Company and the members thereof, being the holders of the obligations or certificates issued or to be issued by this company under the contract between them and said association, dated December 7th, 1867, for the construction of the road from Cambridge City to Hagerstown,
261 shall have a perpetual lien on the income and earnings of that section of the White Water Valley railroad between Cambridge City and Hagerstown, built by that association, to secure all and each of the obligations or certificates issued or that may at any time hereafter be issued by this company, pursuant to the afore-

Exhibit D, referred to by E. F. Osborne & H. C. Lord in their depositions. W. B. Burnet, special examiner.

said contract with that association, in whatever form said obligations or certificates or any renewals, substitutions, or subdivisions thereof may be issued, the same being intended in nature of a perpetual rent on said section of the road, and the president or vice-president of this company are either of them authorized to execute or join in any proper writing, under the corporate seal, granting and securing such lien.

Memorandum of an agreement made this twenty-fourth day of Arpil, in the year 1868, by and between the Indianapolis, Cincinnati and Lafayette Railroad Company and the White Water Valley Railroad Company, party of the first part, and Benjamin E. Smith and Henry C. Lord, trustees, acting in behalf of the Hagerstown Association, party of the second part, as follows, viz:

Whereas the said Indianapolis, Cincinnati and Lafayette R. R. Co., lessees of the White Water Valley R. R. Co., by a contract dated December 7th, 1867, agreed with said Benjamin E. Smith and Henry C. Lord, acting in the name and behalf of said Hagerstown
262 Association of the said W. W. V. R. R. (an association composed of those who should at any time be holders of the obligations or certificates issued or to be issued by the said Indianapolis, Cincinnati & Lafayette R. R. Co. pursuant to the contract aforesaid), that said association should procure the right of way and construct, on a line to be agreed on, that part of the railroad of said White Water Valley Co. between Cambridge City and Hagerstown, at their own expense, and that said Indianapolis, Cincinnati and Lafayette R. R. Co. should issue in payment therefor its irredeemable obligations or certificates to the amount of two hundred and five thousand dollars, bearing perpetual interest of eight per cent. per annum, payable semi-annually, transferable and divisible in the usual form of stock certificates, the same being intended in nature of a perpetual rent on said section of road, as by said contract will more fully appear; and it was mutually understood and agreed between the parties hereto, before advancing the money for the construction of said road and the issuing of said obligations or certificates, that all holders thereof should have a perpetual lien on said section of railroad from Cambridge City to Hagerstown and all income and earnings thereof to secure all such obligations or certificates:

263. Now, therefore, this memorandum witnesseth: That it is mutually agreed between the parties hereto that said Hagerstown Association and all holders of said obligations or certificates and of any renewals, subdivisions, or substitutions thereof, in whatever form issued, shall have a perpetual lien on said section of railroad and on all the income and earnings thereof to secure all such obligations or certificates and the payment of the stipulated annual interest thereon, and, on default of payment, shall have the right to take possession and hold till payment is received; and, further, for the more perfect establishment of said lien, the said party of the first part, in consideration of the premises and of one dollar to them

paid by the said Benjamin E. Smith and Henry C. Lord, do hereby grant and convey to the said Smith and Lord and their assigns the said section of railroad and its appurtenances and all the income and earnings thereof, to hold the same in trust to secure the lien aforesaid, pursuant to the agreement aforesaid, but for no other purpose.

In testimony whereof the said Indianapolis, Cincinnati and Lafayette R. R. Co., by W. W. Smith, their vice-president, and the said White Water Valley R. R. Co., by Henry C. Lord, its president, have caused their respective signatures and corporate seals
264 and the signatures of their respective secretaries to be annexed, and the said Benjamin E. Smith and Henry C. Lord have also affixed their signatures and seals the day and year aforesaid.

THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD COMPANY,
By W. W. SMITH, *Vice-President.*

Attest: —— ——, *Secretary.*

[White Water Valley Railroad Co. Seal.]

THE WHITE WATER VALLEY RAILROAD COMPANY,
By H. C. LORD, *President.*

Attest: J. CHAPMAN, *Secretary.*

B. E. SMITH. [SEAL.]
H. C. LORD. [SEAL.]

Signed, sealed, and delivered in presence of us—
W. T. BOAZ.
JNO. H. FARQUHAR.

STATE OF OHIO, *Hamilton County,* } ss:

Before me, W. T. Boaz, a notary public within and for the county aforesaid, came the Indianapolis, Cincinnati & Lafayette R. R. Co., by W. W. Smith, their vice-president, and the White Water Valley R. R. Co., by H. C. Lord, their president, and acknowledge the within instrument to be the act and deed of their respective companies.

In testimony whereof I have hereunto set my hand and notarial seal this 10th day of July, 1869.

W. T. BOAZ,
Notary Public.

265 Memorandum of an agreement made this 24th day of April, in the year 1868, by and between the Indianapolis, Cincinnati and Lafayette Railroad Company and the White Water Valley Railroad Company, party of the first part, and Benjamin E. Smith and Henry C. Lord, trustees, acting on behalf of the Hagerstown Association.

Whereas the said Indianapolis, Cincinnati and Lafayette Railroad

Company, lessees of the White Water Valley railroad, by a contract dated December 7th, 1867, agreed with said Benjamin E. Smith and Henry C. Lord, acting in the name and behalf of the Hagerstown Association of the White Water Valley railroad (an association composed of those who should at any time be holders of the obligations or certificates issued or to be issued by the said Indianapolis, Cincinnati and Lafayette Railroad Company, pursuant to the contract aforesaid), that said association should procure the right of way and construct, — a line to be agreed on, that part of the railroad of the said White Water Valley Railroad Company between Cambridge City and Hagerstown, at their own expense, and that said Indianapolis, Cincinnati and Lafayette Railroad Company should issue in payment therefor its irredeemable obligations or certificates to the amount of two hundred and five thousand dollars, bearing perpetual in-
266 terest of eight per cent. per annum, payable semi-annually, transferable and divisible in the usual form of stock certificates, the same being intended in nature of a perpetual rent on said section of the road, as by said contract will more fully appear; and it was mutually understood and agreed between the parties hereto, before advancing the money for the construction of said road and the issuing of said obligations or certificates, that all holders thereof should have a perpetual lien on said section of railroad from Cambridge City to Hagerstown and all income and earnings thereof to secure such obligations or certificates:

Now, therefore, this memorandum witnesseth: That it is mutually agreed between the parties hereto that said Hagerstown Association of the White Water Valley railroad and all holders of said obligations or certificates, and of any renewal, subdivision, or substitution thereof, in whatever form issued, shall have a perpetual lien on said section of railroad and on all the income and earnings thereof to secure all such obligations or certificates and the payment of the stipulated annual interest thereon, and in default of payment shall have the right to take possession and hold until payment is received; and, further, for the more perfect establishment of said lien, the said party of the first part, in consideration of the premises and
267 one dollar to them paid by the said Benjamin E. Smith and Henry C. Lord, do hereby grant and convey to the said Smith & Lord and to their assigns and to the survivor of them, his heirs and assigns, the said section of railroad and its appurtenances and all the income and earnings thereof, to hold the same in trust to secure the lien aforesaid, pursuant to the agreement aforesaid, but for no other purpose.

In testimony whereof the said Indianapolis, Cincinnati & Lafayette Railroad Company, by W. W. Smith, their vice-president, and the said White Water Valley Railroad Company, by Henry C. Lord, their president, have caused their respective signatures and corporate seals and the signatures of their respective secretaries to be annexed,

and the said Benjamin E. Smith and Henry C. Lord have also affixed their signatures and seals the day and year above written.

THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD COMPANY,
By W. W. SMITH, *Vice-President.*
Attest: A. WORTH, *Sec't.*

THE WHITE WATER VALLEY RAILROAD COMPANY,
By H. C. LORD, *President.*
Attest: JNO. CHAPMAN, *Sec't.*

B. E. SMITH. [L. S.]
H. C. LORD. [L. S.]

Signed, sealed, & delivered in presence of—
W. T. BOAZ.
JNO. H. FARQUHAR.

268 Memorandum of an agreement and grant made this 28th day of April, 1868, by and between the Indianapolis, Cincinnati and Lafayette Railroad Company, of the one part, and Benjamin E. Smith and Henry C. Lord, trustees, acting in the name and behalf of the Hagerstown Association of the W. W. V. R. R., of the other part.

Whereas the Indianapolis, Cincinnati & Lafayette Railroad Co., lessees of the White Water Valley railroad, by contract dated December 7th, 1867, agreed with said Benjamin E. Smith and Henry C. Lord, acting in the name and behalf of said Hagerstown Association (an association consisting of those who should at any time be holders of the obligations or certificates issued by the said Indianapolis, Cincinnati & Lafayette Railroad Company, pursuant to the contract aforesaid), that said association should construct that part of the railroad of the said White Water Valley Railroad Co. which lies between Cambridge City and Hagerstown, about seven miles in length, and that said Indianapolis, Cincinnati & Lafayette Railroad Co. should issue in payment therefor its irredeemable obligations or certificates to the amount of two hundred and five thousand dollars, bearing a perpetual interest of eight per cent. per annum, payable semi-annually, transferable and divisible in manner of stock certificates, the same being intended in nature
269 of a perpetual rent on said seven-mile section of road, as by said contract will more fully appear, and it was mutually agreed, on surrender of said section of road by said association to said Indianapolis, Cincinnati & Lafayette R. R. Co., that said Hagerstown Association and all holders of such obligations or certificates should have a perpetual lien on the income and earnings of said section of road to secure the semi-annual payments thereon:

Now, therefore, be it known, and it is hereby agreed by the said Indianapolis, Cincinnati and Lafayette Railroad Co., in consideration of the premises, that the said Hagerstown Association and all holders of such obligations or certificates as aforesaid, and of any re-

newals, subdivisions, or substitutions thereof, in whatever form issued, shall have a perpetual lien on the income and earnings of said section of road from Cambridge City to Hagerstown to secure the punctual payment of all said semi-annual interest on said obligations or certificates, and said income and earnings are hereby irrevocably pledged to them for that purpose; and, further, for carrying out the foregoing purpose and for the consideration of one dollar to them paid by the said Benjamin E. Smith and Henry C. Lord the said Indianapolis, Cincinnati and Lafayette Railroad Co. do
270 hereby grant to the said Smith and Lord and the survivor of them and the heirs of the survivor, in trust for the holders of all such obligations and certificates as aforesaid, a perpetual lien on the income and earnings of said section of railroad and a perpetual right and title to the same to secure all such semi-annual payments of interest as aforesaid.

In testimony whereof the said Indianapolis, Cincinnati and Lafayette Railroad Company has caused its corporate seal to be hereunto affixed and the signature of its vice-president annexed the day and year first above written.

[Seal Indianapolis, Cincinnati & Lafayette R. R. Co.]

W. W. SMITH,
Vice-President I., C. & L. R. R. Co.
HENRY C. LORD,
BENJAMIN E. SMITH,
Trustees for the Hagerstown Association of the W. W. V. R. R. Co.

Witnesses:
THOS. MORAN.
W. T. BOAZ.

STATE OF OHIO, *Hamilton County,* } *ss:*

Before me, W. T. Boaz, a notary public within and for the county of Hamilton aforesaid, personally came W. W. Smith, vice-president of Indianapolis, Cincinnati and Lafayette Railroad Company, and acknowledge- the within instrument of writing to be the act and deed of the said Indianapolis, Cincinnati & Lafayette Railroad Company.

271 In testimony whereof I have hereunto set my hand and official seal this twentieth day of November, A. D. 1868.

[Notarial Seal Hamilton County.]

W. T. BOAZ,
Notary Public.

STATE OF OHIO, *Franklin County,* } *ss:*

Before me, a notary public in and for said county of Franklin, personally came Benjamin E. Smith, trustee of the Hagerstown Association of the W. W. V. R. R. Co., and acknowledged the within instrument of writing to be his voluntary act and deed.

In testimony whereof I have hereunto set my hand and notarial seal this 12th day of December, 1868.

[Notarial Seal Franklin County.]

MORTON E. BRASEE,
Notary Public.

EXHIBIT "F," referred to in Deposition of E. F. Osborne. H. F. Brashear, U. S. Com'r.

Ratification of Contract Between Indianapolis, Cincinnati & Lafayette R. R. Co. and Hagerstown Branch R. R. Co.

The stockholders of the Indianapolis, Cincinnati and Lafayette R. R. Co. met at the office of the company, at Morris, on the line of the road, on Monday, the 2nd day of November, 1868, at 10 o'clock a. m., pursuant to by-law and call of the president.

272 On motion of Mr. Smith, seconded by Mr. Forsyth, the following resolution was unanimously adopted, there being fifty-four thousand and nine hundred and forty (54,940) in favor of it and none against it, to wit:

Resolved, That the stockholders approve, ratify, and confirm the action of the board of directors in relation to the construction of the White Water Valley railroad from Cambridge City to Hagerstown, including the resolution of said board adopted December 6th, 1867, providing for raising funds for the construction of the same and issuing certificates therefor; also the resolution adopted January 18th, 1868, approving the contract made pursuant to the foregoing resolution; also the resolution adopted April 23rd, 1868, granting to the holders of such certificates a perpetual lien on the earnings of the said section of road from Cambridge City to Hagerstown to secure the annual payments on such certificates.

Ratification by Stockholders of Contract Between I., C. & L. R. R. Co. and Hagerstown Association of the W. W. V. R. R.

Meeting at Morris, June 11th, 1868.

On motion of Mr. Wright, seconded by Mr. Smith, the following preamble and resolution were adopted:

The president laid before the meeting a contract between this company and the Hagerstown Association of the W. W. V. R. R. for the construction of the railroad from Cambridge City to Hagers-

273 town under the lease of the White Water Valley railroad to this company, said contract bearing date December 7th, 1867, and made pursuant to an order of the board of December 6th, 1867, and approved, ratified, and confirmed by the board January 18th, 1868; and thereupon it was

Resolved, That the stockholders approve and adopt the foregoing contract and the proceedings of the board in relation thereto, and the vote on said preamble and resolution being taken, according to a list on file, there were fifty thousand five hundred and ten shares

of stock voted in the affirmative and none in the negative, and so said preamble and resolution were unanimously adopted.

Names of stockholders.	Shares.
Bryant, William	16
Broadwell, Samuel J.	131
Curwin, Mary T. W.	85
Chapman, Lucinda	60
Green, J. B. & Bro.	10
Ind's Roll. Mill Co.	135
Ind's, Cin. & Laf. R. R. Co.	500
Jenkins, Thomas C.	50
Lord, Henry C.	71
Moody, Andrew	100
Rhodes, J. W.	137
Stephenson, Louisa W.	50
Smith, Benjamin E.	238
Thompson, W. D.	187
Wright, Wm. B.	50
Wright, Nathaniel	65
Wright, Juliet T.	165

Eehibit "G," referred to in deposition of E. F. Osborn. H. F. Brashear, U. S. com.

274 Judge D. THEW WRIGHT, a witness produced on behalf of the complainants, being duly sworn, testifies as follows:

My deposition was formerly taken in this suit before Wm. M. Trevor in September, 1878, merely to prove the "Exhibit No. 2" of the answer of the I., C. & L. railroad. This exhibit is identified by the signature of the examiner. This is a copy in my handwriting of what is known as the agreement, April 25th, 1871, executed on behalf of the C. & I. and I., C. & L. railroad by George Hoadley, attorney; by Chapman Dwight, superintendent and agent of the White Water Valley Company, and Rufus King, attorney for the same, and the Harrison Branch Company, per A. W. Hendrick, attorney. Having been familiar with the document for many years, I know this to be a correct copy.

The defendant, The White Water Valley Railroad Company, objects to the admission of the copy of contract named by D. Thew Wright in his foregoing testimony as against this defendant, on the ground that the same is incompetent and immaterial to the issues as between the complainant- and this defendant.

Cross-examined by C. C. HINES on behalf of the White Water R. R. Co.:

—. Was this copy which you furnish made from the original document?

Ans. That is my recollection.

2 Int. Do you know where the original is?

275 Ans. I cannot say.

D. THEW WRIGHT.

Mr. E. F. OSBORNE, a witness produced on behalf of the complainants, being duly sworn, testifies as follows:

My name is E. F. Osborn; residence, Cincinnati; age, 41; occupation, secretary and treasurer of the C., I., St. L. & C. On the 26th day of September, 1874, I was treasurer of the I., C. & L. and secretary C. & I. The books and records of the I., C. & L. and C. & I. R. R. Co's were on the date last named and still are in my custody as such officer. The papers shown me, marked Exhibits "A," "B," "C," "D," "E," "F," "G," and "H," are true and correct copies of the original records and papers of which they purport to be copies as they appear on the record books of such respective companies and as they appear on file in the respective offices of said companies.

Cross-examination waived by Judge C. C. Hines, solicitor for the W. W. R. R. Co., who waived the production of the original record books and papers of which copies are produced before the examiner, and the same may be received in evidence upon the trial of the cause as if they were the originals of which they purport to be copies, saving unto the defendant all objection so far as the same may be incompetent, irrelevant, or immaterial.

E. F. OSBORN.

WM. B. BURNET,
Special Examiner.

276 Mr. HENRY C. LORD, a witness produced on behalf of the complainants, being first duly sworn, on his oath testifies as follows:

1. State your name, age, and residence.

Ans. My name is Henry C. Lord; I reside in Hamilton county, and I am fifty-six years of age.

2. Please state your relation to the I., C. & L. road in 1867; state when that relation began and terminated.

Ans. I was its president; it commenced in 1855, I think, and terminated in November, 1870.

3. Same question as to the White Water Valley R. R. Company.

Ans. I was its president from the date of its organization until about the commencement of the year 1871; I cannot fix the exact date.

4. Please look at the paper marked Exhibit "A," attached to the deposition of E. F. Osborn, taken in this case, also identified by the signature of the examiner, purporting to be an agreement between the two companies named, and state if there was such an agreement executed between the two companies, and if this is a copy, so far as you are able to say.

Ans. Looking over the contract, I believe it to be a correct copy. I have not examined the original for many years; it was not drawn by myself, but drawn and approved by the counsel of the company, which consisted of Judge Hoadley, of Cincinnati; Judge Wright, of Cincinnati, and Thomas A. Hendricks, of Indianapolis. The
277 original papers relating to the transaction ought to appear on the files of both the I., C. & L. and the White Water Valley

R. R. Co's. The boards of directors of the two companies and, my present recollection is, *that* the stockholders acted upon them.

5. Were the originals of this document with these two companies when you retired from the presidency of each?

Ans. I have no doubt of it; I have no recollection of the exact fact about it, but that is where they belong.

6. Please look at Exhibit "B," Osborn's deposition, identified by the signature of the examiner, purporting to be I., C. & L. resolutions of December 6th, 1867, and state if such resolutions were passed.

(The defendant, The White Water Railroad Company, objects to the admission.)

Ans. I believe it to be a correct copy; that is my recollection.

7. Also, look at the instrument dated December 7th, 1867, between the I., C. & L., on the one part, and Henry C. Lord and Ben. E. Smith, of the other part, identified by the signature of the examiner as Exhibit "B" 1.

Ans. I believe that to be a correct copy, but wish to add that not only that but the other papers as to which I have been examined were not only fully considered by the immediate officers of the company, including its directors, — their counsel and the share-
278 holders, and all the obligations of the contract were observed and respected for some years.

8. Please look at the four following pages in Osborn's deposition, headed "issue of certificates," and state what they are.

Ans. I believe them to be correct copies of the action of the board, and wish to add that General T. A. Morris was and had been for many years the chief engineer of the I., C. & L. Co. and my predecessor in office as president.

9. Please look at Exhibit "C" in Osborn's deposition, also "D," and also "F" and "G," and state what they are.

Ans. Exhibit "C" purports to be and I believe is a correct copy of the certificates issued by the I., C. & L. Com., issued in conformity to the resolutions. Next comes Exhibit "D." I believe it to be a correct copy of the original contract or deed. It accords precisely with my recollection. It is attested by W. T. Boaz, notary public, on the 10th day of January, 1869. The resolution describes or purports to describe, and I believe correctly, the terms of the contract concluded between the railroad company and B. E. Smith and H. C. Lord, and I believe the dates given in the exhibits shown me to be correct. The date of the agreement is given as the 24th day of April, in the year 1868. The next exhibit shown me, following thereafter and dated April 24th, 1868, and signed by W. W. Smith, vice-president I., C. & L. Railroad Co., attested by A. Worth,
279 secretary, and by the W. W. V. R. R. Co., H. C. Lord, president, and attested by Jonathan Chapman, secretary, I believe it to be — correct *copies*. The next exhibit following thereafter, bearing date April 28th, 1868, and purporting to be signed by W. W. Smith, vice-president of the I., C. & L. R. R. Co., and attested by the corporate seal of that company, and, on the other part, by Henry C.

Lord and Benjamin E. Smith, for the Hagerstown Association for the White Water Valley R. R. Co., with the certificates of acknowledgement by W. T. Boaz, notary public, and Morton E. Brazee, notary public —. The next exhibit, marked "F," I believe to be a correct copy of the action of the stockholders of the I., C. & L. Co. at a meeting held at Morris, the second day of November, A. D., 1868 I believe — to be correct. The next exhibit, marked "G," I cannot certify to from present recollection. I have no doubt that the originals of these copies were left with the I., C. & L. and the W. W. V. R. R. Co., where they ought to have been left.

10. State if you were one of the associates who constructed what is known as the Hagerstown Branch—from Cambridge City to Hagerstown—and who were the others.

Ans. I was one; Benjamin E. Smith was another, and several other parties became owners of the certificates issued under the contracts whose names I cannot now recall.

280 Who obtained and paid for the right of way from Cambridge City to Hagerstown?

Ans. My recollection is that considerable part of it was donated by adjacent proprietors; others were obtained or purchased by myself, and others by agents employed by me. That is my recollection of it.

12. To whom were such donations made?

Ans. They were made, — my recollection, directly to the parties building the road and for their exclusive benefit.

13. Who furnished the money to build said branch and all the appurtenances connected therewith?

Ans. I furnished myself to a considerable amount, Mr. Smith a considerable amount, according to my present recollection, the Indianapolis Rolling Mill Co. a large amount of iron, receiving in payment certificates, and other persons purchased certificates.

14. Do I understand, then, that the branch was built on the proceeds of these certificates?

Ans. Undoubtedly, with the aid of donations of the right of way.

15. Was any of the money or credit of the I., C. & L. road, the C. & I road, or the W. W. V. road used or employed in the purchase of a right of way or in building said branch?

Ans. Not that I have any recollection of. We may, and probably did, from time to time, obtain the service of a locomotive to aid in construction, but at some agreed price. The stockholders and

281 officers of both the I., C. & L. and the W. W. V. Companies were anxious for the early completion of the road from Cambridge City to Hagerstown and so form a through and short line from Cincinnati to Chicago, as well as to bring on the main line from Cambridge City to Cincinnati a large local traffic between Hagerstown and Chicago to Cincinnati.

14. As to services of locomotive spoken of in your last answer, was it paid for by you and your associates?

Ans. I have no sort of doubt of it. We hired what was nec-

essary to facilitate our work, and my impression now is that we hired cars also from the Jefferson line or company, as it was called.

15. Were all these proceedings with reference to Hagerstown Branch approved and ratified by the board of directors and stockholders of the I., C. & L. and also the W. W. V. Co.?

Ans. That is my recollection distinctly, and I never heard of any complaint of them until the I., C. & L. Co. went into the hands of the receiver.

Cross-examination by Judge HINES, for the defendant, The W. W. V. R. R. Co.:

16 X. During all the time of these proceedings you were president of each of the two roads, the I., C. & L. and the W. W. V. R. Co's, and a director upon the board of each, were you not?

Ans. Yes, sir; up to the latter part of the year 1870.

17 X. When you speak of the ratification of all the proceedings by the boards and stockholders of the two roads you speak from a general recollection, do you not?

282 Ans. My deposition explains itself. I testify from my recollection of copies purporting to be of original papers shown to me as exhibits. My belief is, and also my recollection is also distinct, that the action of both the boards of directors and the shareholders was both intelligent and wise. We, all of us, acted under the advice of able counsel and aimed to be governed by it.

SATURDAY, *April 1st*, 1882.

Deposition of H. C. LORD, continued.

Question by D. THEW WRIGHT, for complainants:

Ques. 18. Please state if the various associates, N. Wright, Wm. B. Wright, M. T. W. Curwen, L. W. Stephenson, Juliet F. Wright, Sam. J. Broadwell, J. H. Rhodes, and others, whom you can recall, purchased and paid for the certificates ever held by them.

Ans. Mr. N. Wright and D. Thew Wright paid for their certificates. My recollection is distinct that the stock held by Mrs. Curwen, Mrs. Stephenson, and Wm. B. Wright was transferred to them by Nathaniel Wright, who was their father; all the other stock was directly paid for by its holders, but not all of it taken at its par value. The original stock was issued to H. C. Lord and B. E. Smith and by them transferred to these parties.

19. To whom was the certificate for which I paid issued?

Ans. To Mrs. Juliet F. Wright, your wife.

Cross-examination resumed:

283 20. The charter of the W. W. V. R. R. Co. covered the entire line from Harrison to Hagerstown, did it not, as you understood it?

Objected to by counsel for complainant as incompetent and irrelevant.

Ans. I cannot answer that question without referring to the origi-

nal instrument, but I do know that the W. W. V. R. R. Co. did not contribute to the cost of the Hagerstown Extension or Branch; it was not financially able to do so.

21 X. But the mortgage of the W. W. V. R. R. Co., as it existed on the 4th day of December, 1867, covered the entire line from Harrison to Hagerstown, and did not that contract recognize the existence of that mortgage over the entire line and provide for payment of interest thereon?

Objected to as incompetent and irrelevant.

Ans. I do not recollect the phraseology of the mortgage. I certainly never understood myself that the W. W. V. R. R. Co. could, by virtue of a mortgage where no money was advanced, *could* secure an interest in an enterprise the cost of which it did not contribute and which was purely an individual enterprise, encouraged and fortified by the contract with Mr. Smith and myself.

22 X. Did you understand at that time or do you now understand that the mortgage which was named in the contract, a copy
284 of which is referred to in your testimony as Exhibit "A," and upon which the I., C. & L. were to pay the interest, was a mortgage upon which no money had been advanced, or, in other words, that it was without consideration to the W. W. V. R. R. Co.?

Objected to as incompetent and irrelevant.

23 X. The mortgage must speak for itself. I do not remember its phraseology. I have no opinion as to its legal effect; the original issue of bonds by the W. W. V. R. R. Co. was taken by one man, himself a director in the W. W. V. R. R. Co., and he himself declined to aid in the construction of the Hagerstown Extension—I refer to Mr. Dwight—but nominally the original issue was taken by Mr. Joy, formerly of the Michigan Central R. R. Co., who merely acted for Mr. Dwight.

24 X. To refresh your recollection as to your understanding of the facts at that time, let me call to your attention the following extracts from Exhibit "A," above referred to: "And whereas said party of the second part (meaning the W. W. V. R. R. Co.) owns a line of railroad from said Harrison to Hagerstown, in Indiana, which is not yet completed beyond Cambridge City, but it is its desire to complete to Hagerstown, and its said line of railroad is encumbered by a mortgage for one million of dollars and interest." Will you now state whether you did not then understand that the W.
285 W. V. R. R. Co. owned and had mortgaged its entire line from Harrison to Hagerstown, and that the mortgage covered the entire franchise of the company between those points?

Objected to as incompetent and irrelevant.

Ans. I believe, as I stated before, that the paper from which the quotation was made was a genuine copy of the original contract, and it was a necessary inference in my own mind that I understood at the time its terms and provisions. I deem it necessary in this connection to add that the whole capital stock of the W. W. V. R. R. Co.,

or very nearly the whole of it, was owned by Mr. Dwight and myself; there were perhaps fifty thousand dollars of it issued to Mr. Thomas Dwight, a brother of Mr. Dwight.

25 X. Had the line between Cambridge City and Hagerstown been surveyed or located on November 4, 1867?

Ans. I think not, but at this late day do not wish to testify positively. I do, however, state positively that it was not contemplated to build the road from Cambridge City to Hagerstown until negotiations were completed or on foot by which the Columbus, Chicago & Indiana Central R. R. Co. were to divert their business from Chicago to Cincinnati from what was known as the Richmond route to the W. W. V. R. R. route.

286 26 X. Had any donations been made or conditionally made at that time for the completion of the eight miles to Hagerstown?

Ans. I cannot answer the question without reference to papers which I presume are in my possession, but doubt if any had been.

27 X. To refresh your recollection I quote from Exhibit "A:" "And said first party (meaning I., C. & L.) and its assigns are to have the benefit of all contributions or donations made or which may be made hereafter for the construction of said portion of road." Do you now remember any more definitely as to subscriptions or donations as above referred to?

Ans. The paper or contract explains itself, of course, but the quotation does not refresh my recollection of any specific date of any donation.

28 X. On yesterday you stated that there were considerable donations of right of way to the builders. Did you mean by that to yourself and Mr. Smith?

Ans. I simply regarded them as donations to be used by us or enjoyed by us in the construction of the Hagerstown Extension, and did not suppose that they belonged of right to the I., C. & L. Co., for Mr. Smith and myself were to build the road, and I am very sure that the I., C. & L. Co. never made any demand on us for any conveyance or transfer of any right of way or donations. If any

287 demand was made the records of the board of directors would show.

29 X. Is it not the fact that these rights of way so donated were donated by the parties in the name of the W. W. V. R. R. Co., and that they were received and used under the franchise of said Co.?

Ans. Oh, they may have been, precisely as in the case of the Harrison Branch, built under the franchise. I presume it was, of the Cincinnati and Indiana Co. I simply mean that they were enjoyed by Mr. Smith and myself without any question by the I., C. & L. R. R. Co. and with the full understanding of the officers of that road.

30 X. Do you remember at what time it first became important, in your judgment, that there should be any lien to secure the two hundred and five thousand certificates?

Ans. I suppose, of course, when the contract was made, the lien

was a lien on the earnings of the road, as it was a proper thing to make.

31 X. I call your attention to Exhibit "B," referred to in your deposition, being the resolution of the I., C. & L. board of December 6th, 1867, and will ask you if you find in that resolution any provision for a lien?

Ans. I do not in terms find any lien provided for, but I do know that it was the understanding of the board that the payment of the accruing interest or dividends upon the Hagerstown certifi-
288 cates should be so secured, and also that such was the understanding of the counsel of the company. Whether or not there was any action taken by the board outside of the contract shown me I do not now say positively, but my recollection is that at a later date such action was taken, but it will appear, I suppose, in one of the exhibits referred to in yesterday's testimony.

32 X. Do you remember whether the contract of December 7th, 1867, providing for the construction of the extension, made any provision for any lien to secure the issue of certificates thereunder?

Ans. I have already testified that the paper shown to me purporting to be a copy of that contract I believe to be genuine and correct, and refer to it in reply to the question.

33 X. Is it not true that before anything was ever done by the board of directors of the I., C. & L. R. R. Co. looking to the creation of a lien to secure these certificates an issue of seventy-five thousand dollars was made, and that the certificates themselves so issued, as well as those thereafter issued, made no mention whatever of any lien securing or intending to secure the same?

Ans. I think I identified as correct one or more copies of resolutions of the board such as your question refers to; also a
289 blank certificate. The certificates actually issued when executed were uniform with the blank.

34 X. Is it not true that the first steps towards creating a lien were made after the substantial completion of the Hagerstown Extension? And to refresh your recollection upon that point I call your attention to Exhibit "D."

Ans. Referring to Exhibit "D" I should, of course, say that at any rate the final contract was of that date, but I presume and have no doubt that it was a matter of discussion before with the directors and their counsel.

35 X. In the papers that you have identified as being correct copies of the original papers there is one agreement or deed, dated April 24th, 1868, and one dated April 28th, 1868. Will you please state why the agreement of April 28th was made after the one of April 24th, 1868?

Ans. I have no present recollection of the reason.

36 X. Do you remember when these deeds were delivered?

Ans. Oh, I can't remember.

37 X. Is it not true that at the time of the contract of December 7, 1867, that the standing and credit of the I., C. & L. R. R. Co. in the market was first class, and is it not true that you considered at

that time that the obligations of that company were an unquestionable security?

Ans. I do not consider and did not then consider that its
290 standing and credit were first class, for its securities and stock were below par, excepting perhaps its first-mortgage bonds, and it had a large floating debt which could only be carried by individual endorsements or a pledge of securities. I did believe that the road was a very valuable property, and that in time, if not forced to rapid liquidation, its securities would enhance in value with increasing transportation.

38 X. Do you know how much in money that extension actually cost, or can you give an approximate estimate?

Ans. My recollection is very indistinct about it. My opinion, without examination of papers, which is hardly more than a guess, is that it cost about one hundred and ten thousand dollars; but it should be added, in this connection, that the certificates provided for and issued to Mr. Smith and myself were not, I think, in any case sold at their par value.

Redirect examination:

39. Do I understand you to say that any of these rights of way were donated to the W. W. V. Co., or were they donated to you and Smith to be used for the benefit of the associates in the construction of the branch?

Ans. I mean just this: that they were intended for the benefit and in aid of the construction of the branch, whether
291 the whole or part of the transfers, so far as they are in writing. The name of the railroad Co. was used for some legal purpose—was used—I don't remember. The certificate-holders certainly had the benefit of it without objection or protest from the railroad company, a bond or a share holder, so far as I know.

40. Was any right of way for the branch obtained before you and Smith undertook the construction?

Ans. According to my recollection, not a foot.

41. Were the deeds referred to in 35 X delivered upon or shortly after their execution?

Ans. I cannot fix the day, but it was the usual course of business to deliver such contracts promptly.

HENRY C. LORD.

A. B. WILLIAMS, a witness for the complainants, being produced and sworn according to law, being interrogated by Mr. S. R. MATTHEWS, counsel for complainants, testifies as follows:

Present: Mr. Matthews, for complainant-; Judge Hines, for the defendants, The White Water R. R. Co.

Q. 1. State your name, age, residence, and present occupation.

Ans. A. B. Williams; age, sixty-two; residence, Cincinnati, Ohio; occupation, salesman with Post & Co., railway supplies.

Q. 2. State what, if anything, you had to do with the
292 acquisition of the right of way of the Hagerstown Branch or Extension of the White Water Valley R. R., between

Cambridge City and Hagerstown, Indiana. If you had anything to do with that acquisition, state when and by whom you were employed for that purpose; who, if anybody, paid you for your expenses and your services in that behalf?

Ans. I secured the rights of way between those points. I think, from the papers; it must have been in 1867. I was employed by H. C. Lord and B. E. Smith. All the compensation I received for services and expenses was paid me by H. C. Lord.

Q. 3. At the time you were employed by Messrs. Lord and Smith were you aware that those gentlemen had a contract for the building of that Hagerstown Branch or Extension from the companies interested?

Ans. It was my understanding that they had.

— 4. When you engaged your services to secure this right of way did you or not understand that you were acting for the firm of Lord and Smith or for the railroad companies or either of them of which Mr. Lord was president at that time?

Ans. I was acting for Lord and Smith. I did not know the railroad companies.

Q. 5. When you received payments from Mr. H. C. Lord
293 for services and expenses for whose account did you understand those payments to be made—Lord & Smith or the railroad companies?

Ans. Lord and Smith.

Q. 6. Did you secure all the rights of way between Cambridge City and Hagerstown; if not, what proportion of them did you secure?

Ans. My impression is that I secured the whole. I don't remember having a case of condemnation, but if there was one I prepared it. I secured all the rights of way there was secured.

Q. 7. State whether or not your claim for expenses and services in this behalf was fully paid; if not, what was the balance due you on that account, when and to whom you presented it for payment, and if at any time you presented it to the White Water Valley R. R. Co. or any of its officers; state when and to which of its officers you presented it, and what answer, if any, was returned to you.

Question objected to by Hon. C. C. Hines, counsel for the White Water Valley R. R. Co., on behalf of that Co., as incompetent and irrelevant.

Ans. My claim was not fully paid. The balance was about five hundred dollars. I presented it to H. C. Lord for payment. He referred me to the Dwights—whichever one was in control. I pre-
sented it to the one of the Dwights who was president or vice-
294 president. I was advised by him to look to Mr. Lord for payment as the party employing me. Mr. Dwight refused to pay me, and assigned as a reason that I must look to Mr. Lord, because he was liable, as he had employed me.

Q. 8. You say in your answer to the last question that when you presented your claim to Mr. H. C. Lord for payment he referred you

to the Dwights. What did he say at that time, with reference to the matter, as to who was liable to pay you?

Objected to for incompetency and irrelevancy.

Ans. His reply to me was he had no money to pay me, and referred me to the Dwights, saying they were in possession of the road, but Mr. Lord did not disclaim his own liability or that of Lord and Smith.

Q. 9. State about the sum of money Lord & Smith paid you for your services in this matter.

Ans. In the neighborhood of two hundred dollars.

Cross-examination by Hon. C. C. HINES, counsel for the White Water R. R. Co.:

X Q. 10. Do I understand you to mean that about two hundred dollars was all the money actually paid, together with five hundred dollars still owing you, for your services and the entire right of way between Hagerstown and Cambridge City?

295 Ans. I mean that that amount was for my personal expenses and services, but did not include any money for rights of way.

X Q. 11. Will you state, then, what consideration was given for such rights of way?

Ans. No money passed. The parties in most cases had given notes, to the best of my recollection—notes to the White Water Valley R. R. Co. The notes I surrendered were taken a few months—shortly before taking the rights of way. I am not positive whether the notes were given to the W. W. V. R. R. Co. or the I., C. & L. R. R. Co., but I am positive the notes were given shortly before I acquired the rights of way.

X Q. 12. In whose name were the rights of way acquired, and what became of the papers executed for the purpose of conveying such rights?

Ans. In the name of the W. W. V. R. R., and the papers are still in my possession, to be held until I am paid.

X Q. 13. Will you be kind enough to attach a copy of one of these rights of way and state whether the others are in substantially the same form?

Ans. I will attach a copy of one of them, which is marked Exhibit "A," Williams' deposition; the others are in substantially the same form.

Re-ex.:

14. About what month in the year 1867 were you engaged in taking these rights of way, and how long were you so occupied?

Ans. It was in July, August, and perhaps September—about three months.

296 15. Have you any copy of the notes referred to by you or any memorandum showing the date or payee of such notes?

Ans. I have not. I don't know that I have.

A. B. WILLIAMS.

It is agreed that the deposition of Henry C. Lord, taken May 12, 1876, and the deposition of M. E. Ingalls, taken Sept. 23, 1878, may be taken as part of the evidence in this cause, reserving all questions of competency and relevancy, the same being attached to these depositions.

Sept. 8, 1882.

C. C. HINES,
Sol. for White Water R. R. Co.
SAM'L R. MATTHEWS,
Sol. for Compl'ts.

EXHIBIT "A" — Williams' Testimony. Wm. B. Burnet, Special Examiner.

Agreement for Right of Way.

Whereas it is proposed to construct a railroad from the town of Cambridge, Wayne county, in the State of Indiana, to Hagerstown, in said county, being a distance of seven miles or thereabouts:

Now, therefore, in furtherance of said projected enterprise and for the consideration of one dollar to me paid by the White Water Valley Railroad Company, the receipt whereof is hereby ac-
297 knowledged, I, Jacob Heiney, of the township of Jackson, in the county of Wayne and State aforesaid, party of the first part, do hereby contract and agree to release and convey, by proper deed of conveyance, to the said White Water Valley Railroad Company, their successors and assigns, the right of way over and across the following-described tract of land, situate in the said county of Wayne and State aforesaid, viz., being a tract of land lying in Jackson township, viz: The northeast quarter of section three (3), in township sixteen (16) and range twelve, known as the White Water canal, and as located for railroad purposes. It is agreed that the railroad company shall fence both sides of said road within six months after completion of said road and provide one good road-crossing with cattle-guards, being a strip of land eighty feet wide from side to side of the same—that is to say, forty feet on each side of the centre of said railroad as finally and permanently located by said White Water Valley Railroad Company—being the line now staked out by said railroad company or on the tow-path on the east side of the same, the said deed of release and conveyance to be executed and delivered to any authorized agent of said railroad company on demand after the permanent location of said railroad.

In testimony whereof I have hereunto set my hand and seal this seventh day of August, 1867.

JACOB HEINEY.
A. B. WILLIAMS, *Ag't.*

298 THE STATE OF OHIO, *Hamilton County,* } ss:

Circuit Court of the United States, District of Indiana.

WM D. THOMPSON *et al.*
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY *et al.* } No. 3311.

The defendants will take notice that on Friday, the twelfth day of May, A. D. 1876, the plaintiffs above named will take the depositions of sundry witnesses, to be used as evidence on the trial of the above cause, at the office of H. F. Brashear, No. 66 West Third street, Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eleven o'clock a. m. and 2 o'clock p. m. of said day and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

D. THEW WRIGHT,
Attorney for Comp's.

Service of the above notice is acknowledged, but except to time, it being too short a notice.

HARRISON, HINES & MILLER,
Att'ys for Def't-.

Served copy of this notice on Butler and McDonald, Hendricks and Hord (A. Hendricks), and Gen. Ben. Harrison this——

299 Deposition of Henry C. Lord, a witness produced and sworn to before me, H. F. Brashear, a commissioner of the circuit court of the United States, southern district of Ohio, at Cincinnati, in the county of Hamilton. State of Ohio, on the 12th day of May, 1876, pursuant to notice hereto attached, this deposition taken on the part of the plaintiff in a certain action now pending in the circuit court of the United States, district of Indiana, wherein W. D. Thompson *et al.* — pl'ffs and White Water Valley Railroad Company are def't-.

The said HENRY C. LORD, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by D. T. WRIGHT, Esq.:

Question 1. State if you were one of the associates who constructed what is known as the Hagerstown Branch, from Cambridge City to Hagerstown, and who were the others.

Ans. I was. Mr. B. E. Smith, of Columbus, Ohio, was associated with me.

Question 2. Who obtained the right of way from Cambridge City to Hagerstown?

Ans. I did. Partly by purchase, mainly by donation.

Ques. 3. Who furnished the money to build said branch and all the appurtenances connected therewith?

Ans. I did, in connection with Mr. B. E. Smith and others, who became the owners of certificates in the Hagerstown Association.

Question 4. Was any of the money or credit of the Indian-
300 apolis, Cincinnati and Lafayette Railroad Company, the Cincinnati and Indiana Railroad Company, the White Water Valley Railroad Company used or employed in the purchase of right of way for building said branch?

Ans. The Hagerstown Branch was built exclusively with the money and credit furnished by myself, with Mr. B. E. Smith, with other parties, who became owners of Hagerstown Branch certificates.

HENRY C. LORD.

THE STATE OF OHIO,
Hamilton County, Southern District of Ohio.

I, H. F. Brashear, a commissioner of the United States court, fifth circuit and southern district of Ohio, hereby certify that the abovenamed Henry C. Lord was by me first duly sworn according to law to testify the truth, the whole truth, & nothing but the truth relating to said cause, and that the deposition by him subscribed as above set forth was reduced to writing by myself, an officer who is not interested in the suit, in the presence of the witness, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and seal this 12th day of May, A. D. 1876.

H. F. BRASHEAR,
U. S. Commissioner.

301 Mr. A. B. WILLIAMS recalled for additional cross-examination.

By Judge HINES:

Ques. 16. Will you please attach to this testimony and make part of your answer copies of all the deeds and releases of right of way in your possession, as you have previously testified, of that part of the White Water Valley R. R. lying between Cambridge City and Hagerstown?

Ans. I will furnish them, and they are attached hereto and identified by the signature of the examiner.

A. B. WILLIAMS.

Mr. H. C. LORD being recalled for further examination.

By Mr. MATTHEWS:

Ques. 17. State whether or not there was any agreement, understanding, or arrangement between the W. W. & V. R. R. Co. and Messrs. Lord and Smith, contractors for building the Hagerstown Branch, with respect to the building of that branch prior to the date of the written contract between that Co. and those parties; if so,

state whether that contract, arrangement, or understanding was verbal or in writing; if verbal, state what it was.

Ans. The W. W. V. R. R. Co. could not, from any financial stand point that could possibly be discovered, have constructed the Hagerstown extension. I testify without any reservation or doubt, and from a very distinct recollection that I had repeated conver-
302 sations with Mr. B. E. Smith with reference to the building of that extension to a connection with the Columbus, Chicago, and Indiana Central road to Chicago prior to the completion of the contract made and ratified by the board of directors. It had become an absolute necessity, in my judgement and in that of my board of directors, to construct this line, although the Co. had no money with which to accomplish the object, but it was accomplished by myself with the approval of the directors, aided by Mr. Smith, the Indianapolis Rolling Mill Co., and some others whose names I do not recall. To the best of my knowledge and belief, and my recollection is quite accurate, neither the W. W. Valley or the I., C. & L. contributed in money, although they did in good feeling and encouragement aid the enterprise. By encouragement and aid I mean that they rented to the contractors one or more engines and several cars, at an agreed price, necessary in its construction, and according to my best memory the same was done by the J. M. and I. R. R. I wish to add in this connection that I was always guided in whatever I did as an officer by the counsel of Judge George Hoadley, of Cincinnati, of Mr. D. Thew Wright, and incidental- by the occasional advice and suggestions of Thos. A. Hendricks and his partners, of Indianapolis; never — any final understanding between
303 Mr. Smith and myself until after full conference with my board of directors, and especially with General Thomas A. Morris, the chief engineer of the I., C. & L. Co.

Ques. 18. Did Lord and Smith employ Mr. Williams to procure the rights of way between Cambridge City and Hagerstown?

Ans. We did employ Mr. Williams and paid him for his services.

HENRY C. LORD.

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

1.

Copies of Grants of Rights of Way Referred to by Mr. A. B. Williams. Wm. B. Burnet, Spec. Examiner.

For the consideration of the cancellation of a certain note given to W. W. V. R. R. Co. or H. C. Lord, pres't of said R. R. Co., I agree to grant the right of way to said W. W. R. R. Co. through my farm south of Hagerstown, provided said R. R. shall be located upon the tow-path of the Hagerstown canal, so far as the same runs through said farm, and provided also that the said railroad Co. shall fence both sides of said road and construct all necessary cattle-guards.

A. W. PARSONS.

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

2.

For the consideration of one hundred and twenty-five dollars to me paid, I agree to grant the right of way to the White Water Valley R. R. Co. through my lot of ground, the same situate
304 south of lot owned by Newcomb and brothers and east of Washington street, said right of way to be one hundred and twenty-five feet wide. It is also agreed the R. R. Co. shall pay me at the rate of one hundred dollars per acre for all land left east of the line of said road and north of Nettle Creek, said payment to be made to me before work shall be commenced.

his
JOHN x FLINN.
mark.

Attested by—
A. B. WILLIAMS.

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

3.

CAMBRIDGE CITY, *Nov.* 26, '67.

I propose selling to the White Water Valley R. R. Co. a strip of land forty rods long and two rods in width, the same running north and south along the west bank of the Hagerstown canal, commencing at a stake near the southeast corner of my lot, situate in section 27, township 16, range 12, thence north along the berm- bank of said canal to a stake five rods south of northeast corner of said lot, the point specified by said stakes to be the centre of said strip of land, for the consideration of two hundred, $200.00, dollars paid to me by said railroad Co., said payment to be made on or before 28th of Nov., 1867.

I hereunto set my hand and seal Nov. 26, '67.

N. S. HAWKINS.

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

4.

This article of agreement, made and entered into this 7th
305 day of Feb., A. D. 1868, witnesseth: That Abraham Copeland and John Copeland, of the county of Wayne, in the State of Indiana, do herein agree to sell to the White Water Valley Railroad Company the right and privilege of taking gravel from a certain tract of ground lying west of said railroad track and north of the Jamestown and Jacksonburg road, said railroad company agreeing to pay for the same at the rate of two hundred dollars per acre whenever they have taken out to the amount one-half acre, and in the event that they should abandon said pit they shall then pay for the same at the rate named above for amount so taken. It is agreed,

also, that the said railroad company shall provide one private road crossing over side track leading to said pit. It is understood and agreed by the parties herein that the said land shall revert to the present owners when the same *being* abandoned by said railroad as a gravel pit.

A. COPELAND.
JOHN COPELAND.
W. W. V. R. R. CO.,
Per A. B. WILLIAMS, *Ag't.*

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

5.

CAMBRIDGE CITY, *Nov.* 26, '67.

Mr. A. B. Williams.

D'R SIR: In answer to your request for a proposition from me as to the right of way for the White Water Valley R. R. over any ground I will say this: That if they will build said road so that the west rail of the track of the same when permanently
306 laid shall be to the north of the north post of my stable-lot fence, where it now stands; or, in other words, (75) seventy-five feet and (7) seven inches from the south corner of my stable north to said road, in consideration of said track being permanently located and used as specified, I will agree with the W. V. R. R. to give them the right of way of so much of my ground as they may choose to occupy north of said fence; and I further agree to relinquish all claims I may or might have as to damage, either to my stable or other property on Green street: Provided, however, That the grade on said Green street shall at no point on the same exceed by (12) inches (twelve) the present length of the national road at the crossing of Green street.

Yours. &c., J. W. CARPENTER.

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

6.

This indenture witnesseth: That on this 30th day of May, 1874, Robert Newcom, Franklin G. Newcom, and Elizabeth Newcom, wife of the said Franklin G. Newcom, all of Wayne Co. and State of Indiana, for and in consideration of the sum — five hundred dollars to them paid by the White Water Valley Railroad Company, have this day granted unto the said White Water Valley Railroad Company the right of way for railroad purposes, as now constructed and located, one hundred and twenty-five feet in width through the
307 premises herein mentioned and described, as follows, to wit, the same being in Jefferson township, Wayne county, and State of Indiana, and in township No. 17, range 12 east, and beginning at a point on the section line dividing section No. 23 and 26, and north of Battle Creek, and north of the White Water Valley railroad bridge, across said Nettle Creek, running thence in a north-

westerly direction through the corner of the southwest quarter of section No. 23 and through a part of the southeast q'r of section No. 22, until it connects with the Chicago and G. E. Railroad.

In witness we affix our hand- and seal- this day and date above written.

ROBERT NEWCOM. [SEAL.]
F. G. NEWCOM. [SEAL.]
ELIZABETH NEWCOM. [SEAL.]

STATE OF INDIANA, } ss:
Wayne County, }

Before me, William W. Woods, a notary public within and for the county of Wayne aforesaid, on this 30th day of May, 1874, personally came Robert Newcom and F. G. Newcom, the above-named grantors, and acknowledged the execution of the annexed deed to be their act and deed for the uses and purposes therein specified.

Witness my hand and notarial seal this 30th day of May, 1874.

WILLIAM W. WOODS,
Notary Public

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

7.

Article of agreement made this twentieth day of Decem-
308 ber, 1867, between John Flinn, of Wayne county, in the State of Indiana, and the White Water Valley Railroad Company, witnesseth:

The John Flinn, for and in consideration of one hundred dollars per acre paid him or his assigns by said White Water Valley Railroad Company, hereby agrees to sell and convey by deed of acquittal the following-described real estate, situated in Wayne county, in the State of Indiana, to wit, being all of the land owned by said Flinn east of the said White Water Valley railroad, in said county and State, as above written, the same to be measured on or before the 1st day of January, 1868, at which time said Flinn agrees to execute and deliver to said railroad company a good deed of acquittal, upon receipt of one hundred dollars per acre, for the full amount of land owned by said Flinn and located as above described; also no trespass to be made upon said land by said company until the purchase-money is paid.

In witpess whereof the said parties have hereunto set their hands this twentieth day of December, 1867.

his
JOHN x FLINN.
mark.
WHITE WATER VALLEY R. R. CO.,
By A. B. WILLIAMS, *Ag't.*

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

(8.)

This indenture witnesseth that John Flinn and Ann Flinn, his

wife, the grantors, of Wayne county, in the State of Indiana,
309 convey and warrant to the White Water Valley Railroad Company of Ohio and State of Indiana, for the sum of one hundred and twenty-five dollars, the following real estate in Wayne county, in the State of Indiana, to wit, being a strip of land one hundred and twenty-five feet wide (125) from side to side of the same—that is to say, sixty-two and one-half feet (62½) on each side of the center of the W. W. Valley R. R. line as now located through a certain lot owned by me and lying west of Washington street and south of lot owned by Newcom Brothers, in the subdivision of the town of Hagestown, and known as Hati.

In witness whereof the said John Flinn and Ann Flinn, his wife, the grantors, have hereunto set their hands and seals this twentieth day of December, 1867.

his
JOHN x FLINN. [SEAL.]
mark.
her
ANN x FLINN. [SEAL.]
mark.

STATE OF INDIANA, } *sct:*
Wood County, }

Before me, William W. Woods, a notary public in and for said county, this twentieth day of December, 1867, personally came John Flinn and Ann Flinn, his wife, the grantors in the annexed deed, and acknowledged the execution of the annexed deed.

Witness my hand and notarial seal.

WILLIAM W. WOOD. [SEAL.]
Notary Public.

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

310 (9.)

Agreement for Right of Way.

Whereas it is proposed to construct a railroad from the town of Cambridge City, in the county of Wayne, in the State of Indiana, to Hagerstown, in said county, being a distance of seven miles or thereabouts, now, therefore, in furtherance of said projected enterprise and for the consideration of one dollar to me paid by the White Water Valley Railroad Company, the receipt whereof is hereby acknowledged, I, Isaac Stonebraker, of the township of Jefferson, in the county of Wayne and State aforesaid, party of the first part, do hereby contract and agree to release and convey, by proper deed of conveyance, to the said White Water Valley Railroad Company, their successors and assigns, the right of way over and across the following described tract of land, situate in the said county of Wayne and State aforesaid, viz., being a strip of land lying in section 26, township 17, range 12, and known as the White Water canal, said road to be confined to the tow-path of said canal as near as practicable. It is agreed that the railroad company shall *from* both sides

of the road within one year after the completion of said road, and construct convenient road-crossing with cattle-guards, being a strip of land 100 feet wide from side to side of the same—that is to say,
fifty feet on each side of the centre of said railroad as finally and
311 permanently located by said White Water Valley Railroad
Company. The said deed of release and conveyance is to be executed and delivered to any authorized agent of said railroad company, on demand, after the permanent location of said railroad.

In testimony whereof I have hereunto set my hand and seal this 8th day of Aug., 1867.

ISAAC STONEBRAKER,
A. B. WILLIAMS, *Ag't.*

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

(10.)

Agreement for Right of Way.

Whereas it is proposed to construct a railroad from the town of Cambridge City, Wayne county, in the State of Indiana, to Hagerstown, in said county, being a distance of seven — or thereabouts, now, therefore, in furtherance of said projected enterprise and for the consideration of one dollar to me paid by the White Water Valley Railroad Company, the receipt whereof is hereby acknowledged, I, Jacob Heiney, of the township of Jackson, in the county of Wayne and State aforesaid, party of the first part, does hereby contract and agree to release and convey, by proper deed of conveyance, to the said White Water Valley Railroad Company, their successors and assigns, the right of way over and across the following described tract of land, situate in the said county of Wayne and
State aforesaid, viz., being a tract of land lying in Jackson
312 township, viz., the northeast quarter of section three (3), in
township (16), and range twelve (12), known as the White Water canal, and as located for railroad purposes. It is agreed that the railroad company shall *from* both sides of the road within six months after the completion of said road and provide one good road-crossing with cattle-guards, being a strip of land eighty feet wide from side to side of the same—that is to say, forty feet on each side of the centre of said road as finally and permanently located by said White Water Valley Railroad Company, being the line now staked out by said railroad company on the tow-path on the east side of same. The said deed of release and conveyance is to be executed and delivered to any authorized agent of said railroad company, on demand, after the permanent location of said railroad.

In testimony whereof I have hereunto set my hand and seal this seventh day of August, 1867.

JACOB HEINEY,
A. B. WILLIAMS, *Ag't.*

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

(11.)

Agreement for Right of Way.

Whereas it is proposed to construct a railroad from the town of Cambridge City, Wayne county, in the State of Indiana, to Hagerstown, in said county, being a distance of seven miles or thereabouts, now, therefore, in furtherance of said projected enterprise,
313 and for the consideration of one dollar to me paid by the White Water Valley Railroad Company, the receipt whereof is hereby acknowledged, I, Daniel Ulrich, of the township of Jefferson, in the county of Wayne and State aforesaid, party of the first part, do hereby contract and agree to release and convey, by proper deed of conveyance, to the said White Water Valley Railroad Company, their successors and assigns, the right of way over and across the following described tract of land, situate in the said county of Wayne and State aforesaid, viz., being a strip of land known as the White Water canal, the said railroad line being located upon said tow-path, as near as practicable, and being a part of S. ½ S. E. qr. of sec. thirty-four (34) and part of S. W. qr. S. 34, in township 17, range 12. It is agreed that the railroad company shall *from* both sides of said road within one year from completion of said road, and construct one road-crossing with cattle-guards, being a strip of land one hundred feet wide from side to side of the same—that is to say, fifty feet on each side of the centre of said railroad as finally and permanently located by said White Water Valley Railroad Company, the said deed of release and conveyance to be executed and delivered to any authorized agent of said railroad company, on demand, after the permanent location of said railroad.

In testimony whereof I have hereunto set my hand and sale this seventh day of August, 1867.

DANIEL T. ULRICH,
A. B. WILLIAMS, *Ag't.*

EXHIBIT — Williams' Testimony. W. B. Burnet, Spec. Ex.

314 (12.)

Agreement for Right of Way.

Whereas it is proposed to construct a railroad from the town of Cambridge City, in the county of Wayne and State of Indiana, to Hagerstown, in said county, being a distance of seven miles or thereabouts: Now, therefore, in furtherance of said projected enterprise and for the consideration of one dollar to me paid by the White Water Valley Railroad Company, the receipt whereof is hereby acknowledged, I, M. Meyers, of the township of Jackson, in the county of Wayne and State aforesaid, party of the first part, do hereby contract and agree to release and convey, by proper deed of conveyance, to the said White Water Valley Railroad Company, their successors

and assigns, the right of way over and across the following-described tract of land, situate in the said county of Wayne and State aforesaid, viz., being a strip of land known as the White Water canal and lying in sec. 10, township 16, range 17, and extending from the south line of said section to north line of same, the railroad to be confined to the bed and tow-path of said canal. It is agreed that the railroad Co. shall fence both sides of said road within one year from completion of same, being a strip of land 100 feet wide from side to side of the same—that is to say, fifty feet on each side of the centre of said railroad as fully and permanently located by said White
315 Water Valley Railroad Company. The said deed of release and conveyance is to be executed and delivered to any authorized agent of said railroad company on demand after the permanent location of said railroad.

In testimony whereof I have hereunto set my hand and seal this 7th day of Aug., 1867.

MARTIN MYERS.
A. B. WILLIAMS, *Ag't.*

I certify that the foregoing are true and correct copies of the grants of rights of way furnished me by Mr. A. B. Williams and referred to in his answer when recalled.

WM. B. BURNET,
Special Examiner.

Mr. H. C. Lord being recalled for further examination this 28th day of June, 1883, by complainants, the W. W. R. R. Co., by its counsel, Judge Hines, objects to any further testimony being taken, because his deposition has been heretofore formally closed.

The previous question put to Mr. Lord is repeated as follows:

By Mr. MATTHEWS:

Ques. 19. State whether or not there was any agreement, understanding, or arrangement between the W. W. V. R. R. Co. and Messrs. Lord and Smith, contractors for building the Hagerstown Branch, with respect to the building of that branch prior to the date of the written contract between that Co. and those parties.
316 If so, state whether that contract, arrangement, or understanding was verbal or in writing. If verbal, state what it was.

Ans. My recollection is, and I am sure I cannot be mistaken, that the whole project of the Hagerstown Branch, including its importance to the W. W. V. and the I., C. & L., as its lessor, was the subject of frequent discussions and propositions for its construction before the final consum-ation of the contract referred to, it being settled that the W. W. V. Co. could not build the Hagerstown Extension with any resources at its command. The contract was agreed to by all parties as an alternative and a necessary one. These negotiations and discussions were anterior to the execution of the contract.

Ques. 20. State whether or not these discussions and negotiations anterior to the contract resulted in an understanding or agreement between the officers of the railroad Co. and Messrs. Lord and Smith

that the latter were to have the contract when it was finally entered into in writing upon the terms contained in that written contract?

Ans. Undoubtedly so; otherwise the written contract would not have been made, and, in my judgement, the extension would not have been made.

Ques. 21. State whether or not the rights of way were procured by Mr. Williams for the Hagerstown Extension in reliance upon the agreement made prior to the execution of the formal written contract.

317 Ans. I don't remember the dates, but have no doubts whatever that Mr. Williams was directed by myself to solicit rights of way upon faith of the understanding or agreement assented to by all the officers that the formal contract, in conformance with the agreement, would be entered into. First came the negotiations and understanding; then the formal contract; then the action of the companies endorsing the formal contract.

Cross-ex. by Judge HINES:

Ques. 22. The first contract between the I., C. & L. and the W. W. V. R. R. Co's was made November 4, 1867, was it not?

Ans. I do not remember the dates, but refer to the records.

Ques. 23. And the contract between the I., C. & L. R. R. Co. and yourself and Mr. Smith was executed on the 7th of December, 1867, was it not?

Ans. I think I have answered that question two or three times.

Ques. 24. Do you mean now to say that there was an agreement between yourself and Mr. Smith, of the one part, and the I., C. & L. R. R. Co., of the other part, that yourself and Smith were to build the Hagerstown Extension before the contract between the I., C. & L. and the W. W. V. R. R. Companies?

318 Ans. I have not the slightest doubt of it whatever, because Mr. Dwight, of Boston, was director in both of them and the largest shareholder in both. Gen. T. A. Morris, chief engineer of the Indianapolis Co., was also one of its directors and reported upon the W. W. V. R. R. Co., and there was a constant official intimacy and concurrence of views between the two companies.

Ques. 25. Do you remember the date when the contract between yourself, as president of the W. W. V. R. R. Co., and Mr. Smith, as president of the Columbus, Chicago and Indiana Central R. R. Co., was made? I mean relatively as to the contract of November 4, 1867, and that of December 7, 1867.

Ans. I cannot now from present memory state the date.

X Ques. 26. Is it your recollection that prior to any of these contracts being executed by the several parties thereto and prior to the resolution passed by the board of directors of the I., C. & L. R. R. Co., which, I believe, has been heretofore referred to in your evidence as the resolution of December 6th, 1867, that there was an agreement between yourself and Smith, of the one part, and the I., C. & L. R. R. Co., of the other part, for the construction of the extension? And, if so, state whether that agreement was in writing; and, if so, who signed the same?

Ans. The agreement between myself and Smith was neces-
319 sarily the result of many conferences; some in New York; some in Columbus, where he resided. His purpose and my own was a common one—to connect and benefit through line of transportation, if possible. The course of these conferences between us were constantly communicated, verbally or otherwise, to the officers of both the I., C. & L. and the W. W. V. R. R. Companies; but I will not undertake at this date to testify as to relative dates. There was not a week at sometimes that I was not in full communication with both the directors and counsel of the two R. R. Co's. I have no present recollection that the agreement was in writing. The records of the Co. ought to show all its official acts.

X Ques. 27. When you say that you were in constant communication, verbally or otherwise, with the officers of the I., C. & L. and the W. W. V. R. R. Companies what officers do you refer to?

Ans. All of the directors; treasurer of the I., C. & L. (Mr. Rockwood), who was also a director in the W. W. V. R. R. Co.

X Ques. 28. Do you mean that your communications to the directors of those Co's were made to them in session as boards or separately as individuals?

Ans. Both.

— Ques. 29. If there was any agreement prior to the exe-
320 cution of the contract of November 4th, 1867, heretofore referred to, between yourself and Smith, of the one part, and any other person or corporation, of the other part, for the building of the Hagerstown Extension you may state who was the other party.

Ans. I have not stated that there was any written agreement, giving any date, from present recollection. I do not state that it was perfectly understood and agreed in advance of the final action of the Co. that the extension was to be built. Work, especially on railroads, is often done in anticipation of a future contract substantially agreed to and to be legally ratified. I cannot answer the question further from present recollection.

HENRY C. LORD,

I hereby certify that counsel for the complainants, Mr. S. R. Matthews, and counsel for the defendants, Judge C. C. Hines, have agreed in my presence that these depositions and exhibits may be filed without the ordinary formal opening certificates of dates, place, etc., as both counsel were present when each interrogatory was put and the answer given.

WM. B. BURNET.
Special Examiner.

321 STATE OF OHIO, *City of Cincinnati:*

I, William B. Burnet, do hereby certify that the above-named Henry C. Lord, A. B. Williams, D. Thew Wright, and Edward F. Osborne appeared before me and, in the presence of the counsel named, were sworn according to law to testify the truth relating to the cause named, and that the deposition by each subscribed, as

above set forth, was reduced to writing by me in the presence of the respective witnesses, counsel also agreeing as to the exhibits being properly attached to said depositions.

WILLIAM B. BURNET,
Special Examiner.

I request the court and counsel to fix and allow my fee herein, and suggest that Mr. S. R. Matthews has named one hundred dollars as a proper sum.

Respectfully, WM. B. BURNET.

322 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and evidence in the cause of William D. Thompson *et al. vs.* The White Water Valley Railroad Company *et al.* as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said circuit court this 13th day of February, A. D. 1886.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 238. William D. Thompson, Thomas H. Jenkins, Andrew Moody, *et al.*, appellants, *vs.* The White Water Valley Railroad Company and The Indianapolis, Cincinnati & Lafayette Railroad Company. Filed March 25, 1886.

THE SUPREME COURT OF THE UNITED STATES.

WILLIAM D. THOMPSON *et al.*, Appellants,
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY and The Indianapolis, Cincinnati and Lafayette Railroad Company and the White Water R. R. Co. } No. 26.

It is agreed for the purposes of this case, without prejudice to the other rights or remedies of either party in the case, that the averments of fact in the answer of the White Water R. R. Co. commencing on p. 55 of the printed record with the words "And this defendant, further answering," in the 24th line from the bottom of the page, and extending to the words "as this defendant is informed and verily believes," in the 23rd line from the top of page 57 of said printed record, are true; and on the trial of this suit in the circuit court the proper evidence was introduced and agreements were made to prove the truth of said averments.

The foregoing being, however, subject to the following exception:

Except that the allegation commencing at line 15 on printed page 56 of the record, in the following words: "But said complainants, at the time they received the said certificates, had full notice and knowledge thereof," is to be construed only as averring constructive notice, except as to complainant D. Thew Wright, who, being one of the trustees in the mortgage, had actual notice.

Aug. 1, 1889.

W. H. H. MILLER,
Solicitor for the White Water Valley R. R. Co. and the White Water R. R. Co.
C. B. MATTHEWS,
Solicitor for Appellants.

[Endorsed:] Supreme Court U. S. 1889, October term. No. 26. Wm. D. Thompson & *al.*, app'ts, *vs.* The White Water Valley R. R. Co. *et al.* Stipulation of counsel in regard to record.

[Stamped:] Office Supreme Court U. S. Filed Aug. 14, 1889. James H. McKenney, clerk.

The United States of America to the White Water Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an order of the Supreme Court of the United States entered on the 8th day of April, A. D. 1889, in a cause wherein William D. Thompson, Thomas H. Jenkins, Andrew Moody, Benjamin E. Smith, Henry C. Lord, Joseph H. Rhodes, Lucinda Chapman, Samuel J. Broadwell, and Daniel Thew Wright, trustees, The Indianapolis Rolling Mill, Samuel J. Broadwell, Nathaniel Wright, Sr., William B. Wright, Mary F. W. Curwen, Juliet F. Wright, and Louisa W. Stephenson are appel-

lants and you are an appellee, to show cause, if any there be, why the decree rendered against the said appellants by the circuit court of the United States for the district of Indiana should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

MELVILLE W. FULLER,
Chief Justice of the United States.

I hereby acknowledge service of the within citation on the White Water Railroad Company, the same to have the same effect as if served in the usual way on the proper officer of the company in Indiana, reserving, however, all other rights.

July 31, '89.

W. H. H. MILLER,
Solicitor for White Water R. R. Co.

[Endorsed:] Supreme Court U. S. 1889. Oct'r term. No. 26. Wm. D. Thompson *et al.*, app'ts, *vs.* The White Water Valley R. R. Co. *et al.* Citation to White Water Railroad Co. & proof of service.

[Stamped:] Office Supreme Court U. S. Filed Jul- 31, 1889. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1889.

No. 26.

WM. D. THOMPSON ET AL., APPELLANTS,

vs.

THE WHITE WATER VALLEY R. R. CO. ET AL.

EXHIBIT A.

An indenture, made this first day of August, one thousand eight hundred and sixty-five, by and between the White Water Valley Railroad Company, a body corporate by the laws of the State of Indiana, party of the first part, and William Dwight, of the town of Brookline, and Thomas Dwight, of the city of Boston, and both of the State of Massachusetts, and Daniel Thew Wright, of the city of Cincinnati and State of Ohio, party of the second part, as follows:

Whereas said party of the first part, constructing their railroad from the town of Harrison, in Dearborn county, in the State of Indiana, to the town of Hagerstown, in Wayne county, in said State of Indiana, passing through or into the counties of Dearborn, Franklin, Fayette, and Wayne, in said State of Indiana, its length being about sixty-five miles, have resolved to issue their bonds to the amount of a million of dollars—that is to say, one thousand coupon bonds, to be dated the first day of August, in the year one thousand eight hundred and sixty-five, and to mature on the first day of August, which will be in the year of our Lord one thousand eight hundred and ninety, each for the sum of one thousand dollars, and bearing interest at the rate of eight per cent. per annum, payable semi-annually, to wit, on the first days of February and August of each and every year, principal and interest to be payable at the American Exchange National Bank, in the city of New York, to the said William Dwight, Thomas Dwight, and Daniel Thew Wright, or to the bearer thereof; and further to secure said bonds in respect of the payment thereof, both as to principal and interest, according to their tenor, said company have resolved to cause to be made, recorded, and delivered according to law a mortgage upon the said railroad, its real estate, franchises, rights of way, whether held by grant or contract, and its property and privileges of every description, to said William Dwight, Thomas Dwight, and Daniel Thew Wright, in such manner that all of said bonds which shall be issued to the amount aforesaid, purporting on their face to be secured by said mortgage, shall have equal benefit of said mortgage, and that there shall be no preference or priority of lien among any of them:

Now, therefore, this indenture witnesseth: That the said White Water Valley Railroad Company, in consideration of the premises aforesaid and of one dollar to them paid by the party of the second part, and for the purpose of perfecting the security aforesaid, do by these presents, grant, bargain, sell, assign, transfer, and convey to

the said party of the second part and their assigns and to the survivor or survivors of them and assigns and to the heirs of the survivor all the said railroad of the party of the first part and all the right of way and land occupied thereby, with the superstructure, rails, bridges, viaducts, culverts, fences, water stations, and all the property and materials, rights and privileges, now or hereafter appertaining to said road, and the benefits of all contracts with other railroad companies now existing or hereafter to be made, and all property, rights, and interests under the same, and all the depots, depot buildings, station-houses, wood-sheds, and land occupied or to be occupied by either; all engines, tenders, cars, tools, machinery, materials, furniture, machine shops, offices, and all the equipments of said road either now belonging to or hereafter to be occupied by said party of the first part, and all the appurtenances, franchises, rights, and privileges to the said party of the first part in relation to their road aforesaid belonging or in anywise appertaining, and all income, tolls, and all profits of said road:

To have and to hold the premises above conveyed, with the appurtenances, unto the party of the second part and their assigns, and to the survivor or survivors of them and assigns, and to the heirs of the survivor, upon the following trusts—that is to say, for the general purpose of securing all the aforesaid bonds of the said party of the first part, bearing date on the day of the date of this indenture, and purporting on their face to be secured by this mortgage and described as aforesaid, and interest; that in case the said party of the first part shall fail to pay the interest or principal of any of the bonds aforesaid, or any part thereof, at any time when the same shall become due and payable, when demanded, then, after sixty days from such default, on request of the holder of any bond on which such default shall be made, that the said party of the second part and the survivor of them, and any trustee or trustees who may lawfully succeed to the trusts of this deed, may and shall enter into and take possession of all or any part of the premises by this indenture conveyed, and as the attorney or attorneys, agent or agents, of said party of the first part, or otherwise, by themselves or their agents or substitutes, hold, use, manage, and employ the same, making from time to time all needful repairs, alterations, and additions thereto; and, after deducting expenses of such use and management, repairs and alterations, and additions, and a reasonable compensation to the trustees, applying the proceeds thereof to the payment *pro rata* of all principal and interest remaining due and unpaid on any of said bonds; and also shall, on the written request of the holders of a majority of said bonds secured by this mortgage, cause the premises hereby conveyed, or so much thereof as shall be necessary to pay and discharge all the principal and interest then due and unpaid on any of said bonds, to be sold at public auction in the city of Indianapolis, in the State of Indiana, giving at least forty days' notice of the time, place, and terms of sale, and of the specific property to be sold, by publishing the same in at least two newspapers of general circulation in each of the cities of Indianapolis and Cincinnati, New York and Boston, and where-

ever else required by law, and execute to the purchaser or purchasers thereof, as attorney or attorneys of said party of the first part or otherwise, a good and sufficient deed or deeds of conveyance in fee simple of the property sold, which shall be a bar against the said party of the first part, their successors and assigns, and all persons claiming under them, of all right and interest or claim in law or equity in or to the premises sold or any part thereof; and out of the proceeds of such sale shall first pay all the costs, charges, and expenses attending such sale and the execution of this trust and the management of said property, including a reasonable compensation to the trustees, and then shall pay all the interest and principal then remaining due and unpaid on any bonds aforesaid, and the residue, if any, shall restore to the said party of the first part, their successors or assigns, it being expressly understood that in no case shall any claim or advantage be taken of any appraisement laws or extension laws to prevent an entry or sale in manner aforesaid; and the said party of the first part hereby covenants to execute and deliver further suitable conveyance or conveyances that may be requisite for more fully carrying into effect the object of these presents, particularly for the more perfect assurance of any property hereafter acquired by the party of the first part and included in the description of this deed, and for the more perfect assurance and transfer of any contract made with any other railroad company; and, further, it is mutually agreed that the said party of the second part and any and every trustee who shall at any time have the execution of these trusts shall only be accountable for reasonable diligence in the discharge of any duties or services devolving on them as such trustees, and shall not be responsible for the acts of any agents employed by them, such agent having been selected with reasonable discretion; and, further, that they or any of them shall be entitled to a proper compensation for their services and responsibility in the discharge of the trusts aforesaid, in case they or any of them shall be compelled to take possession of the premises or any part thereof, or to manage the same or make sale thereof as aforesaid; and, further, in case of the death, incapacity, or refusal of said William Dwight, Thomas Dwight, or Daniel Thew Wright, or any other trustee who may lawfully succeed to these trusts to serve as trustee in the premises, then that a trustee or trustees may be agreed upon by instrument in writing between said party of the first part and a majority in amount of the holders of these bonds secured by this mortgage, or a trustee or trustees may be appointed by any court of record in the State of Indiana having jurisdiction in the matter, and the trustee or trustees so agreed upon or appointed shall have and succeed to all the rights, title, interests, powers, and duties of the party of the second part or their heirs, or any other trustee or trustees so unable or refusing to act or their heirs shall execute all requisite and suitable deeds and conveyances to transfer, convey to, and rest in the trustee or trustees so to be agreed upon or appointed all right, title, interest, claim, power, duty, or authority by this indenture vested in the party of the second part:

Provided, nevertheless, and this indenture is on the express condition, that if the said party of the first part shall well and truly pay all the bonds hereby intended to be secured, as before stated and described, with the interest thereon as the same respectively becomes due and payable, then and in that case this indenture and every part thereof shall be void and of no effect; and until default be made in payment of said bonds, or the interest thereof or some part thereof, the party of the first part shall hold, occupy, and use, by himself or his lessee, the said mortgaged premises as fully as though this mortgage had not been made; and the said party of the first part further covenant and agree that for the further security of said bonds authorized to be issued hereunder and secured hereby they will, semi-annually, on the first days of August and February of each and every year after their road shall have been opened for transportation and until the principal of said bonds shall be fully paid, set apart the sum of seventy-five hundred dollars, making the sum of fifteen thousand dollars per annum, from the earnings or rent of said road for the preceding year, and deposit such sums in such bank as the party of the second part shall designate, to be invested by the company with the approval of said trustees, as soon as practicable thereafter, in the purchase of the bonds issued under this mortgage, so long as the same can be purchased at or under ten per cent. above par, and when they cannot be purchased at or under that price, then the said sums shall be invested in other securities at the discretion of said company and said party of the second part; but such other securities shall, under the approval of said trustees, be, resold, whenever it can be advantageously done, for the purpose of buying the bonds secured by this mortgage, and all bonds when so purchased by said company for the use of the sinking fund shall, as soon as purchased, be turned over to and held by said trustees, their survivors, successors, or assigns, and all interest accruing on said bonds so held shall be invested by said trustees, with the approval of the company, in bonds of the company or other securities, as above provided.

And it is expressly understood that the bonds of the company to be purchased for said sinking fund shall be purchased after notice published at least one month inviting proposals from holders for sale to the company for that purpose, and the lowest bid shall be accepted; said notice to be published both in Cincinnati and Boston newspapers.

It is hereby further provided that as the bonds purchased and held for the sinking fund are held by the trustees solely to collect interest thereon, and inasmuch as the keeping thereof may be hazardous, the trustees and the company shall at the end of each year after said sinking fund shall be in operation cancel the bonds of the company purchased during the preceding year, and the amount of the bonds so canceled shall be entered on the books of the company as a registered debt due from the company to said trustees, on which the company shall pay the trustees the same interest at the same semi-annual periods as the company would have paid if the trustees had held the bonds and collected the coupons, and the interest on

said registered debts shall be secured by this mortgage and its payment enforced in the same manner as the coupon interest is secured, and the payment thereof enforced by the provision of this indenture, and the interest on said registered debts shall be appropriated by said trustees in the same manner and to the same purpose as said coupon interest would have been by the provisions of this indenture, and when all the bonds secured by this indenture are retired and canceled as herein provided said registered debts shall be deemed null and effaced from the books of the company.

In witness whereof the said White Water Valley Railroad Company, to four originals of this indenture, have caused their corporate seal to be affixed and the same to be signed by their president, Henry C. Lord, and attested by their secretary, Jonathan Chapman; and the said William Dwight, Thomas Dwight, and Daniel Thew Wright have also affixed their hands and seals to each of said originals the day and year first aobve written.

STATE OF OHIO,
City of Cincinnati, Hamilton County.

This may certify that on this *Thursday* of October, A. D. 1865 before me, W. W. Smith, notary public, personally appeared Henry C. Lord, president, and Jonathan Chapman, secretary, of the White Water Valley Railroad Company, personally known to me to be the president and secretary of said company, and whose signatures are attached to the foregoing instrument as such president and secretary, and, being duly sworn, do depose and say that they were president and secretary of said company, respectively, at the date of the execution of this foregoing instrument and are still such president and secretary, respectively, and that such instrument was executed by and under a resolution of the board of directors of said company, and that under and by virtue of said resolution the seal of said company has been affixed to said instrument by them, and that the seal thereto attached is the seal of said company, and that they did then and there acknowledge that the said indenture was executed and was delivered by the said company as aforesaid, acting through them by virtue of the said resolution, as the free act and deed of said company and for the uses and purposes therein expressed, and that the said seal is the seal of the said company, and that the said signatures are their signatures as said president and secretary, respectively, and that said instrument is the deed of the company.

In witness whereof I have hereunto set my hand and official seal this 4th day of October, 1865.

W. W. SMITH,
Notary Public in and for Hamilton County.

Received for record October 6, 1865, at one o'clock p. m., and recorded in the Records of Mortgages of Dearborn county, Indiana, in Book Number 11, pages 19, 20, 21, 22, 23, 24, and 25, October 7, 1865, at 11 o'clock a. m.

ALVIN J. ALDEN, *Recorder.*

Received for record October 31, 1865, at 8 o'clock a. m., and recorded in the Record of Mortgages of Franklin county, Indiana, in Book "F," pages 45, 46, 47, 48, 49, 50, and 51.

GEO. F. MAXWELL,
R. F. C., Ind.

Received for record November 13, 1865, at 1 o'clock p. m., and recorded in the Record of Mortgages of Fayette county, Indiana, in Book "D," pages 175, 176, 177, 178, 179, 180, 181, 182, and 183.

DANIEL RENCH,
R. F. C., Ind.

Received and recorded November 28, 1865, at 9 o'clock a. m., in Mortgage Record No. 12, pages 574, 575, 576, 577, 578, and 579.

J. R. WHITACRE,
Recorder of Wayne County, Indiana.

THE SUPREME COURT OF THE UNITED STATES.

WILLIAM D. THOMPSON *et al.*, Appellants,
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY and The Indianapolis, Cincinnati and Lafayette Railroad Company and the White Water R. R. Co. } No. 26.

It is agreed for the purposes of this case, without prejudice to the other rights or remedies of either party in the case, that the averments of fact in the answer of the White Water R. R. Co. commencing on p. 55 of the printed record with the words "And this defendant, further answering," in the 24th line from the bottom of the page, and extending to the words "as this defendant is informed and verily believes," in the 23rd line from the top of page 57 of said printed record, are true; and on the trial of this suit in the circuit court the proper evidence was introduced and agreements were made to prove the truth of said averments.

The foregoing being, however, subject to the following exception:

Except that the allegation commencing at line 15 on printed page 56 of the record, in the following words: "But said complainants, at the time they received the said certificates, had full notice and knowledge thereof," is to be construed only as averring constructive notice, except as to complainant D. Thew Wright, who, being one of the trustees in the mortgage, had actual notice.

Aug. 1, 1889.

W. H. H. MILLER,
Solicitor for the White Water Valley R. R. Co. and the White Water R. R. Co.
C. B. MATTHEWS,
Solicitor for Appellants.

[Endorsed:] Supreme Court U. S. 1889, October term. No. 26. Wm. D. Thompson & *al.*, app'ts, *vs.* The White Water Valley R. R. Co. *et al.* Stipulation of counsel in regard to record.

[Stamped:] Office Supreme Court U. S. Filed Aug. 14, 1889. James H. McKenney, clerk.

The United States of America to the White Water Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an order of the Supreme Court of the United States entered on the 8th day of April, A. D. 1889, in a cause wherein William D. Thompson, Thomas H. Jenkins, Andrew Moody, Benjamin E. Smith, Henry C. Lord, Joseph H. Rhodes, Lucinda Chapman, Samuel J. Broadwell, and Daniel Thew Wright, trustees, The Indianapolis Rolling Mill, Samuel J. Broadwell, Nathaniel Wright, Sr., William B. Wright, Mary F. W. Curwen, Juliet F. Wright, and Louisa W. Stephenson are appel-

lants and you are an appellee, to show cause, if any there be, why the decree rendered against the said appellants by the circuit court of the United States for the district of Indiana should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

MELVILLE W. FULLER,
Chief Justice of the United States.

I hereby acknowledge service of the within citation on the White Water Railroad Company, the same to have the same effect as if served in the usual way on the proper officer of the company in Indiana, reserving, however, all other rights.

July 31, '89.

W. H. H. MILLER,
Solicitor for White Water R. R. Co.

[Endorsed:] Supreme Court U. S. 1889, Oct'r term. No. 26. Wm. D. Thompson *et al.*, app'ts, *vs.* The White Water Valley R. R. Co. *et al.* Citation to White Water Railroad Co. & proof of service.

[Stamped:] Office Supreme Court U. S. Filed Jul- 31, 1889. James H. McKenney, clerk.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

WILLIAM D. THOMPSON AND OTHERS,
APPELLANTS,

No. 238. — vs. —

THE WHITE WATER VALLEY RAILROAD COMPANY ET AL.

Appeal from the Circuit Court of the United States for the District of Indiana.

Briefs for Appellants.

This case comes up on appeal from the Circuit Court of the United States for the District of Indiana, sitting at Indianapolis. The error complained of in the decree below is that a certain lien, claimed by the complainants on a section of railroad originally belonging to the White Water

Valley Railroad and extending from Cambridge City to Hagerstown, in the State of Indiana was not given priority over a lien by mortgage claimed to include after acquired property.

Bill. The bill was filed on the 13th day of November, 1873, and after making the formal allegations, alleged that in the year 1865, the White Water Valley Railroad Company was organized under the laws of the State of Indiana to locate, construct and operate a line of railroad from Hagerstown in Wayne County, Indiana, to the town of Harrison, Dearborn County, on the boundary line between the States of Indiana and Ohio; and that thereafter on the 4th day of November, 1867, the said line of railroad was partially constructed and in operation, to-wit from the town of Cambridge City to the town of Harrison, but at said date the said White Water Valley Railroad was without equipment and said corporation was without means to purchase the same or to complete said line of railroad as originally contemplated and on said day they made a contract of lease with the Indianapolis, Cincinnati and Lafayette Railroad Company, whereby in consideration of certain mutual covenants the last named corporation agreed to supply all the necessary equipment, materials and operatives for and to operate the said line of railroad of the said White Water Valley Railroad Company for the period named in said lease, and that it was further agreed therein that the said Indianapolis, Cincinnati & Lafayette Railroad Company should, at its own expense, proceed to finish in good and safe running order, for the accommodation of the public, that part of the line of railroad then actually uncompleted, that is to say, the section between Hagerstown and Cambridge City, being the distance of about eight miles, and that in the construction of said section, said Indianapolis,

Exhibit A. Lease to I. C. & L. R. R. Co.

Cincinnati & Lafayette Railroad Company might adopt any reasonable plan, and upon such completion, said last named corporation was to be entitled perpetually to the entire income and profits arising from the same. (A copy of which lease is *Exhibit "A"* of the bill, printed record *page 7*.) That thereupon the said Indianapolis, Cincinnati & Lafayette Railroad Company went into possession of said property, and for the purpose of performing its covenants and in order to open and maintain a connecting line of railway at Hagerstown with the Columbus, Chicago & Indiana Central Railroad, and to interchange business with the said last named corporation in accordance with the terms of a certain agreement theretofore entered into, did, on the 7th day of December, 1867, make and enter into a certain written contract with Benjamin E. Smith and Henry C. Lord, a copy of which is attached to said bill, marked "*Exhibit B*," and is found at *page 11* of the printed record. By the contract Exhibit B, said Smith and Lord were to construct the said line of railway or extension from Hagerstown to Cambridge City. And the said Indianapolis, Cincinnati & Lafayette Railroad Company were to issue to them, or to such parties as they might suggest, the obligation of said lats named company to the aggregate of two hundred and five thousand dollars divided into shares of one hundred dollars each, which obligations should be transferable on the books of said last named corporation, like shares, the principle thereof being irredeemable, but bearing a perpetual interest at eight per cent. per annum, payable semi-annually, on the first days of June and December of each year.

Ex. B. Lord & Smith contract. Dec. 7, 1867.

The bill further alleges that the said line of railroad was duly completed under said contract and accepted, and

that said Indianapolis, Cincinnati & Lafayette Railroad Company remained in possession and use of said section of road from July 1st, 1868, until about May 1st, 1871, and issued the certificates mentioned above. That on the 28th day of April, 1868, while the said work was in progress and in order better to secure the prompt payment of said eight per cent interest it was agreed between the said contractors and said Indianapolis, Cincinnati & Lafayette Railroad Company that the holders of such certificates should have a perpetual lien on all the earnings and income of said section of railroad to secure the payment of said semi-annual installments of interest as aforesaid, and on the 23d day of April, 1868, said lien was given by resolution of its Board of Directors, which was confirmed by its stockholders on November 2d, 1868. That on the —— day of ———, 1868, said White Water Valley Railroad Company ratified and confirmed said contract, and directed its president to execute or join in any instrument of writing necessary or proper to effectuate the agreement for such lien; and the resolution of the Board of Directors of said company is attached to said bill, marked *Exhibit C*, and is contained in the printed record, commencing at *page 13*. It is further alleged that said extension was built entirely by money furnished through the sale of said certificates, and contains a list of the persons to whom these sales were made. A copy of one of said certificates is attached to the bill marked *Exhibit D*, and contained in the printed record, commencing at *page 14*. It is alleged that the said Indianapolis, Cincinnati & Lafayette Railroad Company, continually, from December, 1867, to June 1st, 1870, out of the income of said section of railroad, paid the regular semi-annual installments of interest falling due on said obligations, but that since said last-mentioned date no interest

Ex. C. Res. of Directors.

Ex. D. Copy of certificate.

has been paid. That on the 20th day of November, 1868, the said Indianapolis, Cincinnati & Lafayette Railroad Company signed, sealed, and delivered, by their duly authorized agents and officers, a paper writing, declaring and effectuating the aforesaid lien, a copy of which agreement is attached to said bill, marked *Exhibit E*, contained in the printed record, commencing at *page 15*. That on the 10th day of July, 1869, the said White Water Valley Railroad Company, by its duly authorized agents, did jointly, with the said Indianapolis, Cincinnati & Lafayette Railroad Company, execute under its corporate seal, and deliver, a certain paper writing, commonly called a mortgage, wherein the obligations of the said corporations, thereinbefore mentioned, were recited, and, in order to effectuate the lien contracted for, did convey the said section of railroad to Benjamin C. Smith and Henry C. Lord, in trust for the holders of said certificates. A copy of this conveyance is attached to the bill, marked *Exhibit F*, and is found in the printed record, commencing at *page 16*. The bill further alleges that, on or about May 1st, 1871, it was agreed by and between the two said railroad corporations, that the original contract of November, 1867, should be cancelled, and the road of the White Water Valley Railroad Company returned to it; that such cancellation was carried out, and that thereafter the White Water Valley Railroad Company operated said property, received its revenue and earnings, amounting, as is charged in the bill, to the sum of one hundred thousand dollars; and it was agreed in writing between the said railroad companies, that the said White Water Valley Railroad Company should, as part of the consideration for the surrender to it of said railroad from Hagerstown to Cambridge City, recognize he priority of the lien of all the holders of

Ex. E. Contract of I. C. & L. Co., giving lien.

Ex. F. Mortgage.

said certificates, and, should either pay and discharge the interest thereon perpetually, or make other satisfactory arrangements with such holders, or, failing therein, would surrender to said Indianapolis, Cincinnati & Lafayette Railroad Company the possession of said railroad from Hagerstown to Cambridge City, and cease to operate the same or to receive the earnings thereof. It is then charged that the said White Water Valley Railroad Company has taken and maintained possession of said section of railroad since the first day of May, 1871, to the time of the filing of the bill, and has been in receipt of all the earnings thereof, but has wholly disregarded its obligations to the holders of the certificates above-named. It then prays that an account may be taken of the income and earnings of said branch, and that out of same the amount due the complainants shall be directed to be paid, and that in default of payment that the lien be foreclosed and the property sold. It was also prayed that a receiver be appointed to take and manage said property, and the bill wound up with a prayer for such other and further relief as might be necessary and proper in the premises.

Ex. A. Lease. Extracts.

Exhibit A, commencing at *page 7* of the printed record, is the contract of lease mentioned in the bill, wherein it is recited as follows: "And, whereas, said party of the second part (The White Water Valley Railroad Company) owns a line of railroad from said Harrison to Hagerstown, in Indiana, which is not yet complete beyond Cambridge City, but it is its desire to complete to Hagerstown, but is without means to do so, and its said line of railroad is encumbered by a mortgage for one million of dollars and interest, and being without equipments, or resources to procure the same, it is unable to operate the said road, or without aid, to pay such interest, as the same shall semi-annually become due,

and is thus in danger of forfeiting its charter and losing its property; and, whereas, to enable said railroad of said party of the second part to be completed to Hagerstown, and to be maintained, operated, and used as the laws of the land and the convenience of the public require, said parties desire to enter into a perpetual running arrangement, whereby the interests of both and of the public may be promoted."

The clause relating to the finishing of the road is found on *page 10*. The lease provided—"And, further, in consideration of the premises, and inasmuch as the railroad is not constructed and finished from Cambridge City to Hagerstown, and the second party (W. W. V.) is without the means of finishing it promptly, it is mutually agreed that said first party (I., C. & L.) shall cause that portion of the road to be constructed and finished under the charter of the second party, at the cost and expense of said first party, and put in good and safe running order for the accommodation of the public, *and shall be entitled to all the profits, income and earnings of the same perpetually, which are hereby guaranteed to said first party and its assigns in case it completes the construction of said portion of the road, and in that case no further compensation is to be paid to the second party on account of said portion.*"

On page 11 is contained a provision that said party of the first part or its assigns in said construction are to have the benefit of all contributions or donations made or which might thereafter be made for the construction of said portion of the road.

Exhibit B. the contract under which this extension was constructed, recites the above mentioned agreement, and therein Lord and Smith agree to construct the extension Ex. B.

from Hagerstown to Cambridge City in a workmanlike and first-class manner, providing all suitable materials, side-tracks, depots and other necessary adjuncts, and the said party of the first part (The Indianapolis, Cincinnati & Lafayette Railroad Company) agreed to furnish, without charge, any right of way or other conveniences for construction, if any such she should have or control along the portion of the road to be constructed; and the said second party (Lord & Smith) were to have the benefit of all subscriptions or donations which had been made or might thereafter be made for the construction of said portion of said road; and it was agreed that in payment for said construction said first party was to issue to said second party or to such persons as they might direct, and in such sums or amounts as they might desire, the obligations of said first party, divisible into shares of one hundred dollars each, transferrable only on the books of said first party, to be the aggregate amount of two hundred and five thousand dollars, said obligations to be irredeemable, and binding said first party to pay to the holders thereof forever an annual interest of eight per centum per annum, payable semi annually on the first days of June and December of each year, at the office of said first party in Cincinnati, the same to bear interest from the first day of December, 1867, and to be issued as soon as the work was completed according to the contract and approval by the chief engineer of the party of the first part.

Ex. C. *Exhibit C* is the approval of this contract of the 30th day of October, 1868. It provides (*page 14* of the printed record) that the holders of the obligations or certificates mentioned, should have a perpetual lien on the income and earnings of that section of the White Water Valley Railroad between Cambridge City and Hagerstown.

Exhibit E. found on *page 15.* is another contract be- Ex. E.
tween the said Lord & Smith and the said Indianapolis, Cincinnati & Lafayette Railroad Company, wherein it was recited, that it had been mutually agreed that *the holders of said certificates should have a perpetual lien on the income and earnings of said section of road under contract for construction. and that in order to secure the punctual payment of the interest on said obligations this contract* (Exhibit E) *for further carrying out the purpose mentioned. grants unto the said Lord & Smith, in trust for the holders of said obligations and certificates. a perpetual lien on the income and earnings of said section of railroad. and a perpetual right and title to the same to secure all such semi-annual payments of interest as aforesaid.*

Exhibit F. another memorandum or agreement made Ex. F.
April 24th. 1868, in which the White Water Valley Railroad Company joins. recites the contract of December, 1867, previously mentioned; recites the agreement made before advancing the money for the construction of said road and the issuing of obligations or certificates. that all holders thereof should have a perpetual lien on said road from Cambridge City to Hagerstown. and the income and earnings thereof to secure all such obligations or certificates, and thereupon proceeds to grant the said lien.

On the 5th day of January, 1874. certain other parties came in by cross bill, but the cross bill was afterwards withdrawn and they became joint complainants.

The *answer of the White Water Valley Railroad Com-* Answer of W. W. V. R. Co.
pany, found at *page 19 of the record.* admits the organization of the company as set out in the bill, *and admits the contract attached thereto. Exhibit A.* but it denies that the

Indianapolis, Cincinnati & Lafayette Railroad Company was authorized to adopt any reasonable plan to build said section of railroad, or that upon completion it was entitled perpetually to the income and profits thereof. It admits the execution of the contract of *December 7th, 1867*, *Exhibit B*, and the execution of *Exhibit F*, but denies its delivery and validity. It claims that *Exhibit F* was without consideration and was a device to cheat and defraud the defendant, and that Smith & Lord combined with W. W. Smith and other directors to cheat and defraud it, and that the resolutions ratifying the contracts were passed in pursuance of said scheme. It admits the agreement to cancel the lease, *Exhibit A*, but denies knowledge of the Lord & Smith contract when the cancellation was agreed to; denies that the contract of cancellation had any consideration, or that it recognized the lien of the certificate holders, and alleges that the cost of construction of said extension did not exceed the donations made to Smith and Lord.

Answer of I. C. & L. R. Co.

On the *21st day of May, 1874*, the answer of the *Indianapolis, Cincinnati & Lafayette Railroad Company* was filed. It admits the corporate organization of itself and its co-defendant and the execution of contract *Exhibit A* attached to the bill and the possession of the White Water Valley Road as alleged. It admits the execution of *Exhibit B*, the Lord & Smith contract, and alleges that its terms were carried out and that the two hundred and five thousand dollars' worth of certificates were executed and delivered. It admits the execution of the papers, particularly *Exhibit F and the ratification of the contracts by the stockholders of its co-defendants*, and that interest to June 1st, 1870, on said certificates was paid. It charges that the charters of the two companies did not authorize them to operate their rail-

roads to any common point of intersection, and avers that the lease of the White Water Valley Railroad Company was void, and that about October 25th, 1870, it became embarrassed and unable to pay its debts, and that on January 26th, 1871, it made a contract attached as *Exhibit, No. 1, by which said lease was cancelled;* and other matters immaterial to this controversy, except that at the time of the surrender of the White Water Valley Railroad Company's property to it, *it also surrendered the Hagerstown Extension on the express agreement and understanding that the lien of the certificate holders should be recognized,* and attaches the contract of cancellation, which is called *Exhibit 2* and is found at *page 36* of the printed record, in which it is agreed as follows: "The second party (The Indianapolis, Cincinnati & Lafayette Railroad Company) shall execute to the third party (The White Water Valley Railroad Company) a lease for ninety-nine years, renewable forever, of their branch, extending from Cambridge to Hagerstown, in Indiana, known as the Hagerstown Branch, for which a rent of six thousand one hundred and fifty dollars, or three per cent. upon the certificates of the Hagerstown Association, shall be paid to the stockholders therein at Cincinnati, if they will accept said rental, but in case said association refuses to accept it in full of the outstanding certificates, then said third party shall release and reconvey said railroad to the second party."

Ex. 1 to I. C. & L. Answer. Cancellation of Lease

Ex 2. Same.

The complainants filed replications, which are found on pages 40, 41 and 59 of the printed record. On *page 44* of the *printed record* is found an *amendment* to the *answer of the White Water Valley Railroad Company* denying that any mortgage of the road of said company or any part thereof was ever at any time executed under proper author-

Replications.

Amendment to Answer of W. W. V. R. Co.

ity by the Indianapolis, Cincinnati & Lafayette Railroad Company. At *pages 45 and 46* are found an *amended bill* and also a *supplemental bill*, but they are immaterial to the merits of this controversy, as is also the *answer* of *Henry Hartmann* and others, who were made parties to the suit by the *supplemental bill*, but owing to the coming in of the White Water Railroad Company their presence became immaterial and they were dismissed from the suit.

Amended Bill and Sup. Bill.

On *page 51* is the *answer of the White Water Railroad Company, filed on June 19th, 1879.* It admits the organization of the White Water Valley Railroad Company in 1865 for the purposes mentioned; that its road was partly constructed, but denies that it was wanting in means to finish and equip it; *admits the contract of November 4th, 1867, of lease, to the Indianapolis, Cincinnati & Lafayette Railroad Company*, but denies that said company might adopt any reasonable plan in the construction of the unfinished portion of said road or was entitled to the earnings thereof perpetually. Avers that the Indianapolis, Cincinnati & Lafayette road was to pay the White Water Valley Railroad Company one hundred and forty thousand dollars per year, which was not to be increased when the said unfinished portion of the road was completed; *admits the contract of December 7th, 1867, and alleges that the certificates thereunder were issued, and admits that an agreement for a lien was made, but denies that the White Water Valley Company ratified it. It admits the execution of the deed Exhibit F of the bill, but alleges that it was never delivered.* It alleges that the contract for lien of *December 7, 1867*, was without consideration and void, and that the said agreement was a device of Smith and Lord to defraud the White Water Valley Railroad Company and to make it liable for the obligations of the Indian-

Answer of W. W. R. Co.

apolis, Cincinnati & Lafayette Railroad Company. It denies that the White Water Valley Company ever recognized the lien, and alleges that the actual cost of construction of the Hagerstown extension was not more than one hundred thousand dollars in excess of the donations, and that the hundred thousand dollars came out of the companies of which Smith and Lord were the presidents. It alleges that the property of the White Water Valley Company was covered by the mortgage dated August 1st, 1865, to Wright and others, trustees to secure the payment of its bonds and coupons; alleges the foreclosure of said mortgage, sale of the road and purchase by it.

Replications.

On the *5th of February, 1881*, the *replication of complainants* to this answer was filed; on the *3rd of November, 1881*, there was an *amendment* filed to the *supplemental bill*, alleging that Smith and Lord procured the rights of way for the Hagerstown Extension and paid for them by the same of scrip or certificates now held by the complainants.

Answer to the Amended Bill.

On the *4th of February, 1882*, there was an *answer to the amended bill* filed, saying that the rights of way were acquired principally as donations and under the name of the White Water Valley Railroad Company.

Decree.

The *decree*, found at *page 62* of the *printed record*, was in favor of the *White Water Railroad Company* as a purchaser under the mortgage mentioned and denied priority of lien to the certificates.

Broadwell's Evidence.

The evidence epitomized shows that these certificates were on sale in the market, and that *S. J. Broadwell* purchased thirteen thousand dollars of them on the faith of representations of the officers of the road, naming Lord, Chapman and Hoadly and Wright, counsel.

Henry C. Lord's Evidence.

Henry C. Lord, at *page 16*, testifies that he was the president of the Indianapolis, Cincinnati & Lafayette Railroad Company from its inception up to November, 1870, and of the White Water Valley Railroad Company until early in 1871, and of the Indiana & Cincinnati until late in 1870; that the Lord and Smith contract, *Exhibit B of the bill*, was approved by both boards and the stockholders of both companies; that the White Water Valley Railroad Company never obtained any right of way between Cambridge City and Hagerstown; and on pages 97 and 98 that the money for the rights of way and for the building of the extension was contributed by the Hagerstown certificate holders. That *William Dwight, Thomas Dwight, his brother, and D. T. Wright* were the *trustees of the million dollar mortgage mentioned.* That *William Dwight, his brother and son* and the said *Henry C. Lord* together owned all of the *stock* of the *White Water Valley Railroad Company.* That *William Dwight purchased the whole issue of its bonds under the million dollar mortgage. That he was a member of both boards from the beginning and familiar with all the transactions relating to the building of the Hagerstown extension, and that the trustees of the mortgage were also.* At *page 102* of the *printed record* is found the *agreement of compromise* under which the *property of the White Water Valley Company was turned back to it*, and wherein it recognized the lien of the certificate holders, and at *page 101* is a copy of a *letter dated October 27th, 1871*, of *Chapman Dwight*, which is said to have been *approved by William Dwight, recognizing the obligation* of the White Water Valley Railroad to turn this extension back to the Indianapolis, Cincinnati & Lafayette Railroad Company, inasmuch as the former had failed to effect a compromise with

the certificate holders by the payment of three per cent., as designated in the contract of April 25th, 1871, on the certificates.

Evidence of Osborn.

Commencing on *page 108* of the record is the testimony of *Edward F. Osborn*, who identifies all of the contracts and resolutions relating to the Hagerstown Branch, and on *page 124* is the *agreement of counsel to use copies furnished, in place of originals.*

Evidence of Henry C. Lord.

Henry C. Lord resumes on page 125. He says that all of these contracts were examined, fully considered by the officers, directors, counsel and shareholders of the two companies, and that all the obligations of the Lord and Smith contract were observed and respected for many years. That of the rights of way, some were donated, some purchased by him, others by agents employed by him. That the donations were made to the parties building the road for their exclusive benefit, and that the money to build the branch was furnished by the holders of the certificates, and that no money or scrip of the Indianapolis, Cincinnati & Lafayette Railroad Company, or of the White Water Valley Railroad Company, was used in this business. At *page 128* he says, again, that Dwight took all the bonds, and, at *page 129*, that Dwight and his brother and himself owned all the stock of the White Water Valley Railroad Company; that the actual cost of the extension was one hundred and ten thousand dollars (*page 131*).

Evidence of A. B. Williams.

Commencing on *page 131* is the testimony of *A. B. Williams*, who obtained the rights of way between Hagerstown and Cambridge City. He says he was employed by H. C. Lord and B. E. Smith; he says, further along, that he secured the whole of the rights of way, that he does not re-

member having a case of condemnation, but that his claim for obtaining the rights of way has never been paid. These *rights of way* were obtained in the name of the White Water Valley Railroad Company, and are shown in the *record*, commencing on *page 137*. On *page 133* is found the testimony also of *Williams that the papers were still in his possession, because his claim had never been paid.* On *page 135. H. C. Lord* again testifies that the rights of way were obtained partly by purchase but mainly by donation, and that the certificate holders furnished all of the money that was used in building this extension; and that neither money nor credit of the two railroads was used or employed in any way, shape, or manner. On *page 137* he says, "The White Water Valley Railroad Company could not, from any financial standpoint that could possibly be discovered, have constructed the Hagerstown extension. I testify, without reservation or doubt, and from a very distinct recollection, that I had repeated conversations with Mr. B. E. Smith, with reference to the building of that extension to a connection with the Columbus, Chicago & Indiana Central Road to Chicago, prior to the completion of the contract made and ratified by the Board of Directors. It had become an absolute necessity in my judgment and in that of my Board of Directors, to construct this line, although the company had no money with which to accomplish the object, but it was accomplished by myself, with the approval of the directors, aided by Mr. Smith, the Indianapolis Rolling-Mill Company, and some others whose names I do not recall."

Evidence of Henry C. Lord.

He then testified that he employed Williams to procure the rights of way, and, on *page 144*, he says, "My recollection is, and I am sure I can not be mistaken, that the whole project of the Hagerstown Branch, including its importance

to the White Water Valley and the Indianapolis, Cincinnati & Lafayette as its lessor, was the subject of frequent discussions and propositions for its construction before the final consummation of the contract referred to, it being settled that the White Water Valley Company could not build the Hagerstown Extension with any resources at its command. The contract was agreed to by all parties, as an alternative and a necessary one. These negotiations and discussions were anterior to the execution of the contract."

In answer to the question, "State whether or not these discussions and negotiations, anterior to the contract, resulted in an understanding or agreement between the officers of the railroad company and Messrs. Lord and Smith, that the latter were to have the contract when it was finally entered into in writing upon the terms contained in that written contract?" he said, "Undoubtedly so; otherwise the written contract would not have been made, and, in my judgment, the extension would not have been made."

In answer to the question, "State whether or not the rights of way were procured by Mr. Williams for the Hagerstown Extension, in reliance upon the agreement made prior to the execution of the formal written contract," he said, "I do not remember the dates, but have no doubts whatever that Mr. Williams was directed by myself to solicit rights of way upon faith of the understanding or agreement assented to by all the officers that the formal contract in conformance with the agreement would be entered into. First came the negotiations and understanding; then the formal contract; then the action of the companies endorsing the formal contract." And, in answer to a similar question, on cross examination, he says, "I have not the slightest doubt of it whatever, because Mr. Dwight, of Boston, was director in both of

them, and the largest shareholder in both. General T. A. Morris, Chief Engineer of the Indianapolis Company, was also one of its directors, and reported upon the White Water Valley Railroad Company, and there was a constant official intimacy and concurrence of views between the two companies."

On *page 146* he says: "The *agreement between myself* and *Smith* was necessarily the result of many conferences; some in New York; some in Columbus, where he resided. His purpose and my own was a common one—to connect and benefit through line of transportation, if possible. The course of these conferences between us were constantly communicated, verbally or otherwise, to the officers of both the Indianapolis, Cincinnati & Lafayette, and the White Water Valley Railroad Companies, but I will not undertake at this date to testify as to relative dates. There was not a week, at some times, that I was not in full communication with both the directors and counsel of the two railroad companies. I have no present recollection that the agreement was in writing. The records of the company ought to show all its official acts."

He was then asked this question: "When you say that you were in constant communication, verbally or otherwise, with the officers of the Indianapolis, Cincinnati & Lafayette and the White Water Valley Railroad Companies, what officers do you refer to?" Answer: "All of the directors; treasurer of the Indianapolis, Cincinnati & Lafayette (Mr. Rockwood), who was also a director in the White Water Valley Railroad Company." Question: "Do you mean that your communications to the directors of those companies were made to them in session as boards, or separately as individuals?" Answer: "Both."

ARGUMENT.

The facts upon which it is claimed that the lien attempted to be secured to the holders of what we will call for brevity the Hagerstown Certificates exists, are shortly these:

The White Water Valley Railroad Company was the owner of a partially completed road extending from Harrison to Cambridge City, with the right, under its charter, to continue its road a distance of between seven and eight miles, to Hagerstown. There is no evidence in the case that it had in any way, shape, or form made use of its franchise between Cambridge City and Hagerstown, even for the purpose of *locating* its line, nor that it possessed a single foot of right of way.

That thereupon it made the contract by which certain persons were to acquire the rights and build an extension of its road to Hagerstown. That these rights of way were never vested in the railroad company, and its only rights to the extension were under the contract mentioned, whereby such rights came into its possession encumbered with the lien of the persons who had furnished the money that built such portion of the road, under the express agreement for such a lien.

It is alleged that the lease (*Exhibit A*, to the Bill) was invalid under the laws of Indiana.

It is immaterial to this case whether the lease was valid or not. It was a method adopted by which the White Water Valley Railroad Company endeavored to build the extension mentioned, when it had no means of its own available for that purpose. According to the testimony of Mr. Lord, already quoted, the inability of that company to build this

extension was recognized. The actual plan afterwards adopted was the subject of discussion. That company had only three stockholders. Mr. Dwight was apparently the owner of all its bonds. All of the officers, trustees, and stockholders were fully cognizant of the plan agreed on; and that it was about to be put in operation; and on the 7th day of December, 1867, a contract was made between the I., C. & L. R. R., which by its lease had secured to it the perpetual right to the income of said extension, whereby Smith and Lord agreed practically for themselves and their associates to furnish the rights of way and money necessary to build the seven or eight miles then incomplete. The rights of way were obtained by an agent of Lord and Smith, for their benefit, but in the name of the White Water Valley Railroad Company, without the use, however, of the latter company's franchise. The rights of way were mere contracts. There is no evidence that the lands were ever conveyed by deed to the White Water Valley Railroad Company, or that the company ever obtained any right in them except through and under the contract of Lord and Smith, so that there was no title to which a mortgage, even though by its terms it covered after acquired property, could attach; much less could the mortgage attach to promissory notes given as donations and intended to be used in building the road. 104, U. S., 25. *Holroyd vs. Marshall*, 10 H. L., 191, 208. It is alleged that this contract was a scheme, or device on part of Lord and Smith, to defraud the White Water Valley Railroad Company; but no evidence was offered other than that Lord was an officer of both companies. Such a contract is not void as matter of law, but is only voidable at the option of the injured company when seasonable advantage is taken of its right.

Twin Lick Oil Co. vs. Marbury, 91 U. S., 587. See 103 U. S., 732.

Hotel Co. vs. Wade, 97 U. S., 13.

Wardell vs. R. R. Co., 103 U. S., 651.

If avoided, honest expenditures must be refunded.

Thomas vs. Brownville, etc., R. R. Co., 109 U. S., 522.

There not only was no unconscionable advantage taken, but the matter was entered into in the full light of day, with the knowledge and consent of all the parties concerned, with a view of giving to the White Water Valley Railroad Company that which it could not otherwise obtain, and which was a valuable benefit, and was recognized repeatedly afterwards, with full knowledge of the facts, by its officers, directors, and stockholders; and by fulfilling its obligations for three years; and its validity finally recognized in the contract of April 25th, 1871, under which the extension together with the rest of the property was turned back to the White Water Valley Railroad Company.

If it were necessary to cite authorities to the proposition that where land is conveyed by A to B a vendor's lien arises for the unpaid purchase price, many are to be found in the books. This lien is circumscribed by but one qualification. It will not be upheld as against an innocent purchaser for a valuable consideration. In some states it is held that the vendor's liens may arise in favor of one who is not, technically speaking, the vendor. It was so held in the cases of:

Carey vs. Boyle, 53 Wis., 574.
Guston vs. Underwood, 37 Ills., 438.
Rutland vs. Bristoe, 53 Miss., 683.
Poe vs. Paxton, 26 W. Va., 607.

In the following Indiana cases:

Johns vs. Sewell, 33 Ind., 1.

Fleece vs. Orear, 83 Ind., 200.

Dwenger vs. Branigan, 95 Ind., 221. And in:

Russel vs. Watt, 41 Miss., 602.

The vendor instead of relying upon the lien that equity gives him may provide for it by express contract. In such case it is needless to say that this lien, in some respects, is analogous to a vendor's lien, and may be by the same express contract raised in favor of a person who furnished the means to buy the property, but who is not technically the vendor. The rule applies where the vendee is a railroad company as in other cases.

In *Munns vs. The Isle of Wight Railway Company* (L. R. 5. Chan. Ap., 414) it was held that a person selling land to a railroad company was entitled to a vendor's lien for the purchase price. In that case effort was made to foreclose this lien. In answer to the proposition of the company that the rights of the public intervened and prevented the plaintiff from depriving the company of the right to use his land, the Court held that the company could give to the public only such rights as it might have, and that if the rights of the company were subject to the rights of the vendor the rights of the public must necessarily be so too. The same doctrine is held in the case of *St. Germain vs. Crystal Palace Railway Company* (L. R. 11 Eq. 568), where it is stated that debentures had been issued, but in the mind of the Court they seemed not to have interfered with the enforcement of the vendor's rights.

Winchester vs. Midhants Railway Co., L. R. 5 Eq., 17.

Wing vs. The T. & H. Junction R. Co., L. R. 3 Chan. Ap., 740.

Algood vs. M. & D. R. Co., L. R. 33 Chan. Div., 571
Keane vs. Railway Co., 19 W. R., 43.
Walker vs. Railway Co., 12 Jurist N. S. (Part 1), 18.

That a stipulation in a contract for a lien upon land to secure an obligation, accomplishes its purpose even where the particular lands are not specified, see:

Deacon vs. Smith, 3 Atkins, 323.
Wellesley vs. Wellesley, 4 M. & C. 579.
Metcalf vs. The Archbishop of York, 1 Myl. & C., 547.
Watson vs. Sadlier, 1 Molloy, 585.
Hill vs. McLean, 10 Lea (Tenn.), 187.
Compton vs. Railway Co., 45 O. S., 592.

A mortgage of after acquired property, taking it for granted that the mortgage in this case by its terms covered such property, only attaches to the property by virtue of the contract, but does not operate upon it by way of grant. It only attaches to the property in the condition in which it came into the hands of the mortgagor. In other words, if it comes into its hands encumbered already with a lien, the mortgage attaches subject to that lien.

Beal vs. White, 4 Otto, 382.
Coe vs. Pennock, 23 Howard, 117.
United States vs. New Orleans R. R. Co., 12 Wall., 362.

There is nothing in the record, however, showing that the mortgage included after acquired property.

This same doctrine is held to apply to lands conveyed to a railroad company in the case of *Loomis vs. Davenport, etc., R. R. Co.*, 17 Fed. Rep., 301.

See, also, *State vs. Anderson*, 91 U. S., 607; and *Wright vs. Trust Co.*, 117 U. S., 72.

A lien upon rents is a lien upon the land itself.

Smith vs. Patton, 12 W. Va., 541.

LeGuarde vs. Hodges, 1 Vesey, Jr., 477.

Legard vs. Hodges, 3 Brown's Chan., 441.

Legard vs Hodges, 4 Brown's Chan., 310.

Fremoult vs. Dedir, 1 P. Williams, 429.

Pinch vs. Anthony, 8 Allen, 536.

Such a lien passes by assignment to any person who becomes the owner of the obligation intended to be secured.

Felton vs. Smith, 84 Ind., 485.

The obligation arose in this case when the first agreement was entered into and work commenced.

In *Miller vs. Moore*, 3 Jones (N. C.) Equity, 431, it is stated that a corporation held a title bond; the title was to be conveyed when the purchase money should be paid. This equity the corporation agreed should be mortgaged in behalf of certain stockholders who were about to incur personal liabilities for the company. Such an agreement was entered on the minutes of the company and afterwards a deed of trust was made in conformity therewith. It was held that those members, having acted on the faith of the resolution were entitled to the security and that the deed of trust was but a confirmation of the agreement and had relation to the resolution.

All of the contracts in this case were but parcels of one transaction. It cannot be argued that because the lien was put in the shape of what has been called a mortgage at a time, if any such ever existed, when the property was invested in the White Water Valley Railroad Company, it was an agreement only from that date and was a waiver or postponement of the lien formerly contracted for, so that the

mortgage covering after acquired property attached to the rights of way before the contract giving the certificate holders a lien. See:

Cary vs. Boyle, 53 Wis., 574.

Wellesley vs. Wellesley, 4 Myl. & Cr., 579.

Metcalf vs. Archbishop of York, 1 Myl. & Cr. 547.

Jones vs. Parker. 51 Wis., 218.

Kaiser vs. Limbeck. 55 Iowa, 244.

Pouder vs. Rittsinger, 102 Ind., 571; and

Hewitt vs. Powers, 84 Ind., 295, where it is said that a merger does not take effect where thereby unjustly a subsequent lien would be let in.

Jones on Mortgages. Ch. 5.

R. R. Co. vs. Union Rail Mill Co., 109 U. S., 720.

It has always been held that one who furnishes purchase money of land upon an agreement to receive a lien as security therefor is superior in equity to former creditors except those who may have mortgages upon the specific land at the time of the purchase, and in fact with that exception, and with the exception of subsequent *bona fide* purchasers for valuable consideration such persons are superior in equity to all other creditors and lien-holders.

Kaiser vs. Limbeck. 55 Iowa. 244.

Clark vs. Monroe, 14 Mass., 251.

Kittle vs. Van Dyke, 1 Sanford, (N. Y.,) 76.

Adams vs. Hill, 9 Foster, (N. H.,) 202.

Jackson vs. Austin, 15 Johnson. 477.

Haywood vs. Noony, 3 Barb., 645.

4 Kent's Com., 439.

In the case of *The United States vs. Anderson*, (91 U. S., cited *supra*.) it was held that where a railroad property

was sold by certain sinking fund commissioners of the State of Florida, by virtue of a statutory lien, to secure certain bonds, and wherein it was stipulated that payment might be made in outstanding bonds, a vendor's lien resulted to them, in favor of those bonds that had not been taken up and paid in on the purchase money, although apparently no express reservation of such lien was contained in the deed.

In the case of *Wright vs. The Farmer's Loan & Trust Company*, (117 U. S., *supra.*) it was held that where the Big Sandy Railroad Company, having certain rights in a projected railroad extending from Newport, Ky., to Catlettsburg, had entered into a contract of sale to another company conditional, however, upon the payment of a certain sum of money that no lien, either by mortgage or for construction, could come in ahead of it.

See, also, the case of *Lewton vs. The Dayton, Xenia & Belpre Railroad Company*, (20 O. S., 401,) where a vendor's lien upon railroad property was enforced. We cite these cases for the purpose of showing that the ordinary rules touching vendors' liens, and liens by express reservation or contract apply to railroad property.

In the case of *Coe vs. The Delaware & Lackawanna & Western Railroad Company* (34 N. J. Eq., 266), it is said, "A railroad company having filed a survey of a route over which another company had also filed a survey, having held such other company out as the builder of the track over such route, and having taken the benefit of a contract incident to the laying of such road made in the name of such other company, can not repudiate such contract, on the ground that itself is the builder of such road." It appears in this case that there was a contract between what was called the

Hudson Connecting Company and the Morris & Essex Railway Company, and the Delaware, Lackawanna & Western Railway Company, dated October 16th, 1872, the substance of which was that the Morris & Essex Railway Company should permit the Hudson Connecting Company to construct its railway over that of the Morris & Essex, and, as an equivalent, should have the right to cross the track of the former. The contract was drawn into controversy in this way; George S. Coe, as trustee of certain bondholders of the New Jersey Midland Railway Company filed his bill to foreclose a mortgage given to him by that company as the security for certain bonds. To that suit the Delaware, Lackawanna & Western Railway Company, as the lessee of the Morris & Essex, was joined as a party. The Morris & Essex Road, during the pendency of this proceeding, attempted to construct its line of road by force of the agreement just referred to over the line of the road which it insists is the property of the Hudson Connecting Company, and such effort having been resisted, it filed its bill for the specific performance of the stipulation in question. To the claim thus set up, the complainant Coe, as trustee, denies the ownership of the Hudson Connecting Company of the line of railroad embraced in the claim, and avers that this portion of the railroad track was laid out, constructed, and paid for by the New Jersey Midland, and, consequently, that it passed under the trust mortgage. That mortgage was dated August 1st, 1870, and up to that time, and, in fact, up to the spring of 1871, the New Jersey Midland Company designed to reach the Hudson River by a direct route, but, on account of the expense, found such purpose impracticable, and therefore formed the plan of obtaining the desired terminus by means of a connection with the Pennsylvania Railroad Company.

In furtherance of this design, on July 12th, 1871, it filed a location of what it called its branch line in its survey from a point near Bellman's Creek to the Pennsylvania Railroad at West End. This route was identical with the survey laid by the Hudson Connecting Company, part of which had been laid before, and part after that of the Midland. Under these circumstances the Midland began to acquire the lands necessary for this route, but in a proceeding to condemn lands, having been defeated on the ground of want of power to lay the route in question, the agents in charge of the affair determined to lay such route in the name of the Hudson Connecting Company. Accordingly, this was done, the New Jersey Midland taking the title to such pieces of land as were obtained by agreement with the owners in its own name, the residue of the land being condemned by proceedings in the name and under the charter of the Hudson Connecting Company. In order to help out the cost of the construction of this line of road, bonds were issued by the Hudson Connecting Company, which were secured by a mortgage on its road and franchises. The line thus built was paid for in part by the Midland. The road having been built, the directors of the Midland passed a resolution directing the title to the lands embraced in the route to be conveyed to the Hudson Connecting Company. This conveyance bore date October 16th, 1873. The contention of the complainant was that the proceedings of the agents of the Midland in acquiring this route by force of the charter of the Hudson Connecting Company, and for the uses of such company were beyond the province of their agency, and that such a course of proceeding was at the time neither known to nor sanctioned by the body of directors of the Midland, and that when such Board did subsequently sanction these steps, such

ratification was void as respects the complainant, who was a prior mortgagee. The Court says, with respect to the condemnation of lands made by force of the charter of the Hudson Connecting Company the position is that, in that matter, the charter of that company was used merely as a means to an end, that is to the acquisition of such lands by the Midland. Such a view appears to involve the proposition that, if an agent, in good faith and in the belief that it is best for the interests of his principal, departs from his instructions, and does an act not authorized, and the principal, becoming aware of such act in good faith ratifies it, such ratified act is not binding; and also, the further proposition, that a corporate body, possessed of the right of making a demand, can also transfer such right in its own discretion "pro tanto" to another corporate body. The Court further along says, "If we assume the attitude of respondents with respect to the ownership of the line of road in dispute and hold that such ownership resides in the Midland Railway Company it is impossible to deny, in the acquisition of such roadway, that the Hudson Connecting Company was used as an agent by the managers of the first-named corporation. The title to land has been extorted from unwilling land-owners, and in the name of the Hudson Connecting Company for the benefit of the Midland." The Court further says, "It will be observed that no one act in the progress of the transaction thus described could be taken without presenting, in the most imposing form, this connecting company as the builder of this line of road, and after carrying into effect such a project, and taking into its possession the track thus acquired, it is quite too late for the Midland Railroad to attempt to repudiate a contract honestly entered into with the connecting railroad in the orderly prosecution of such

project. And, in such a respect as this, it is an error to assume this respondent as the mortgagee of the Midland stands in a better position than his mortgagor. All the property and rights acquired by the mortgagor inure to the benefit of the mortgagee, but nothing can be claimed by the latter beyond this."

In the case of *Bottsford vs. The New Haven, Middletown & Niantic Railroad Company* (44 Conn. 454), it appears that a land owner agreed with the railroad company that he would give land for a depot and station of said road if the company would erect a building for the purpose on the land. The company agreed to do so, and employed the petitioner to do the masonry thereon. He began work on November 23rd, 1870, and finished January 17, 1871, and immediately thereafter filed a certificate of his lien. The company began to use the place as a station immediately after making the agreement with the land owner and before the building was commenced, and continued such use before the building was completed. No conveyance of the lands was ever made by the owner. The company had previously, in May and June, 1869, made mortgages of the entire franchise and property of the road, the mortgages providing, in express terms, that they were also to cover all lands and buildings that might afterwards be acquired by or belong to the company. Held, upon a petition to foreclose the lien, that even if the mortgages could legally embrace after acquired property, which the court did not decide, yet the equitable title to the land in question did not vest in the company until the condition on which they received the land was performed by the completion of the buildings, so that it could be conveniently used for the purpose for which it was erected, and that therefore the lien of the petitioner had

precedence of the mortgage incumbrance. On page 467 it is said:

"Now, when did the equitable title to the premises accrue to and become vested in the railroad company? The answer obviously is, when the railroad company had performed the conditions agreed by them to be performed, and which the owner of the land had agreed to accept as an equivalent to the premises; that is to say, when they had erected the depot building on the site designated and completed the same, at least so far forth that it could be conveniently used for the ordinary purposes of such a structure. No vote of the Board of Directors, nor any other agreement by the company that they would erect a depot there, no stopping of trains to discharge and receive freight and passengers at that point can be regarded as a compliance by the company with the terms exacted by Blakesley as the consideration for conveying the land. He offered in effect, and the company understood him to offer, that if they would build a depot there and use it as such he would give them the land. It is true that the company took possession of the land immediately after the agreement was made, but it is stated explicitly in the finding of facts that at the time the complainant commenced his work on the depot building, the railroad company had not commenced to use or occupy the building or the land where it stood, nor had it any other possession of the same than by its employes in the construction of the building."

In *Havens vs. Emery*, 33 N. H. 66, it was held with regard to rails that were purchased and put down upon a road-bed covered by a prior mortgage, that it was competent for the company and the vendor to agree that they should remain personal property and subject to the lien of the vendor for purchase money, although these rails became part of the realty covered by the mortgage.

If the rights of way from Cambridge City to Hagerstown had been acquired by the White Water Valley Railroad Company on its own hook and as its own property, so that the mortgage would attach, and subsequently a con-

tract had been made looking to the mere building of the road between those points upon these rights of way, a different question might be presented. It might be claimed that the mortgage having already attached to the land, whatever was subsequently put upon the land became a part of it and thereby subject to the mortgage lien. This is by virtue of the technical rule that what is built upon land is part of the land itself; but could it be claimed that if a railroad company made a contract with A by which he was to acquire for their use or obtain as a donation for them a lot of land upon which he was to expend the necessary money to build a railroad depot, and for which by the contract under which the land was to be acquired, he was to have a lien for whatever he expended either for land, improvements or both, that the mortgage would, under such circumstances, attach to it and become a lien prior to A's? In other words can a railroad company or its mortgagee take the benefit of a contract and repudiate all of its obligations, or is it to be interpreted as one instrument, so that the right acquired goes with the burden attached? In the case put, by the same rule which protects the mortgagee under ordinary circumstances, to-wit, that technical rule that buildings upon land are simply land, or a part of the land itself, so with A. If his contract gave him a lien for the one sum upon the land itself, though that sum included the price of building the improvement, the land necessarily goes into the hands of the company burdened with that whole lien. It can not be divested except by the act of the person who is entitled to claim it. If A's lien is upon the land it becomes a lien upon all accretions in the same manner and with the same force that the mortgage would if the land were condemned and paid for or purchased.

The title to land vesting in a railroad company does not necessarily become encumbered with a mortgage lien, though the mortgage may cover after acquired property. The property may have been obtained by fraud or it may come clothed with a trust or lien. In such cases the circumstances of the transactions measure the mortgagee's rights. The property acquired must respond to the obligations attached to it when acquired.

The property involved in this controversy was acquired under a contract which secured the purchase price by way of lien upon it. The builders had no connection with the void lease, but void or not void, the White Water Railroad Company could not divest the lien by pleading such illegality because the construction contract depended in no way for its validity upon such lease. The White Water Valley Railroad Company had power to contract for the construction of a part of its road and if such course was reasonable to contract that a lien should encumber the property acquired. It did so. It is submitted, therefore, that appellants' rights should be established by the decree of this Court.

C. B. MATTHEWS,
Of Counsel for Appellants.

[Brief of D. Thew Wright on next page.]

BRIEF OF D. THEW WRIGHT.

The question in this case is—Can a railroad mortgage covering after acquired property, take such property, regardless of the equities attaching to it?

In *Fosdick vs. Schall*, 99 U. S., 235, it is said, p. 251:

"The mortgage attaches to the cars, if at all, because they are after acquired property; but as to that class of property it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagee acquired; no more, no less."

U. S. vs. R. R. Co., 12 Wall, 362.

Union Trust Co. vs. Morrison, 125 U. S.

There are many other authorities to the same effect: *Nielson vs. R. R.*, 44 Iowa, 71; *Krooks vs. R. R.*, 101 U. S., 443; 33 Gratt., 624; 31 Barb.; 10 Bush, 185; 14 Bush.

The record, however, does not show that this mortgage covered after acquired property.

The facts in the case are these: In 1865, the White Water Valley Railroad Company was organized in Indiana, to build a railroad in that State, from Harrison to Hagerstown. As the first duty of a railroad, it issued a mortgage October 4, 1865, for a million of dollars. It is in the usual form of a railroad mortgage, and purports to cover "after acquired" property. Singularly enough, this mortgage was not offered in evidence, and does not appear in the record. Its existence is alleged in the answer of the White Water Railroad Company (not White Water *Valley* R. R. Co.) pp.

55 and 56, printed record, filed June 19, 1879, all of which is duly denied by the replication, filed November 5, 1881, p. 59. No proof is given on the subject, and it is difficult, therefore, to see how any rights can be claimed under a mortgage not proved, or shown, unless we assume that the case was tried in the Court below upon general principles.

But not to interrupt the chronological order of events, by a mere circumstance of this kind. The White Water Valley Railroad Company having thus issued its mortgage, proceeds to build a railroad, for that mortgage to cover. It built its road from Harrison to Cambridge City, and then broke down The gap of seven miles, between Cambridge City and Hagerstown, was untouched, unprovided for, and with no remote possibility of construction. (See Ans. W. W. V. R. R., p. 19, and the recital in the agreement of 4th November, 1867, pp. 7 and 8.)

In order to get its road completed, and this seven miles, called Hagerstown Branch, built, the White Water Valley R. R. Co., on 4th November, 1867, made an agreement with the Indianapolis, Cincinnati & Lafayette Railroad Co. This agreement is p. 7, record, and on p. 10. The Indianapolis, Cincinnati & Lafayette Railroad Company agrees to build this branch from Cambridge City to Hagerstown. To this end, the Indianapolis, Cincinnati & Lafayette Railroad Company hire H. C. Lord and B. E. Smith, to build this branch, as appears by the contract, Exhibit B., p. 11. For this work the Indianapolis, Cincinnati & Lafayette Railroad Company agreed to pay Lord & Smith $205,000. This payment was to be made by the Indianapolis, Cincinnati & Lafayette R. R. Co., issuing 8 per cent. certificates (see form of one, p. 14, Ex. D). To secure these certificates and their holders, a lien on the earnings of the branch was given, Exhibit E., p.

15, also p. 119. For further security, the Indianapolis, Cincinnati & Lafayette R. R., also the White Water Valley Railroad Company conveyed this branch to Lord & Smith. They "hereby grant and convey to the said Smith & Lord, and their assigns and to the survivor of them, his heirs or assigns, the said section of railroad and its appurtenances, and all the income and earnings thereof, to hold the same in trust to secure the lien aforesaid, pursuant to the agreement aforesaid, but for no other purpose." (Ex. F. p. 17.)

Thereupon, the Indianapolis, Cincinnati & Lafayette R. R. issue these certificates and sell them, to innocent purchasers. With the money thus raised Lord & Smith buy (such as is not donated) the right of way from Cambridge City to Hagerstown, buy the material and complete the road. For several years, the Indianapolis, Cincinnati & Lafayette R. R. Co. paid the interest on these certificates, being in possession of all the road from Harrison to Hagerstown, under the contract of November 4, 1867, pp. 7 and 8, and receiving the earnings thereof. All these railroads became insolvent. Then plaintiffs, holders of these Hagerstown certificates, filed this bill, for relief, asking among other things, that this seven miles, built with their money, be sold for their benefit. The White Water Valley Railroad Company, says, that its mortgage is prior to any lien of the certificate holders, and notwithstanding them, the mortgage takes the property. The question is—Does it?

The equity upon which the certificate holders rely, is about this: The White Water Valley Railroad Company had broken down. It had no money to complete its road. Here was an unfinished gap of seven miles, from Cambridge City to Hagerstown, in a through line from Cincinnati to Chicago. There was to be sure a mortgage on these seven

miles, but it covered nothing, and so far as that section of seven miles was concerned, the mortgage did not cover one cent's worth of property. The company had not one foot of right of way, and had not put a dollar into the branch. Lord & Smith set out to build the branch; they built it upon these certificates issued by the Indianapolis, Cincinnati & Lafayette R. R. Co., upon which the necessary money is obtained. The certificate holders furnished this money. Our proposition is, that when this seven miles comes under the White Water Valley Railroad Company mortgage, it comes burdened with a lien for the money which built it. It can not be taken from Lord & Smith, and those for whom they hold the property in trust, without protecting those who are the objects of that trust.

It will be seen from the record that all the parties in interest, at that time, endeavored to make these certificate-holders secure; for that purpose the Ind., Cin. & Laf. R. R. give a lien on the income. Ex. E., p. 15. All the rights of the White Water Valley R. R. Co., having been transferred to the Ind., Cin. & Laf. R. R., by the agreement of November 4, 1867. Ex. A., p. 7. For the same purposes of security it is agreed, by the Ind., Cin. & Laf. R. R. Co., and also the White Water Valley R. R. Co., that the certificate-holders "should have a perpetual lien on said section of railroad, from Cambridge City to Hagerstown, and all income and earnings thereof, to secure all such obligations or certificates." P. 117, Exhibit D.

For that same purpose is the deed of trust, by both companies. Ex. F., pp. 16 and 17.

But, even if none of these instruments existed, would not the simple fact, that these certificate holders advanced

the money to build this seven miles, give them an equity, which would postpone the mortgage of the White Water Valley R. R. Co. to that equity? It is well known that at common law a chattel mortgage did not cover property not in being; and the only way that this railroad mortgage, or any mortgage of "after acquired" property reaches such property, is by considering the instrument an executory contract, establishing an equitable lien thereto: hence it must respect the equities which are inherent in the property itself.

It will be seen from the record that the White Water Railroad Company, a new corporation which has succeded to the rights of the White Water *Valley* Railroad Co. comes into the case *pendente lite;* see its answer, p. 51. It shows that in the proceeding to foreclose the White Water *Valley* R. R. Co. mortgage, this section of seven miles was sold, bought by trustees and conveyed to the White Water Co., who now claim to hold and own it, discharged of the lien of Hagerstown certificate holders, none of whom were parties to that proceeding. Clearly, a party purchasing *pendente lite*, must purchase subject to the pending *lis;* and the White Water Co. can have no more right, than can the holders of the White Water Valley mortgage, which we expect is subject to our lien as certificate holders.

On what possible ground, the Court below refused to allow a judgment against the Indianapolis, Cincinnati & Lafayette R. R. Co., for the unpaid instalments of interest, which it had agreed to pay, is not understood.

This relief is asked by the various certificate holders in their amended bill. (P. 45, Record.) The Ind., Cin. & Laf. R. R. Co. agree to issue their certificates. It makes the agreement of 7th December, 1867, with Lord & Smith, to build

the seven miles extension between Cambridge and Hagerstown, " and in payment for said construction, said first party (The I., C. & L. R. R. Co.) agrees to issue to said second party (Lord & Smith), or to such persons as they may direct, and in such sums and amounts as they may desire, the obligations of said first party, etc." P. 12, Record. All of these contracts were ratified and approved by both the board and stock holders of the different companies. P. 13–94–112–113–114–122.

The certificate itself shows, p. 14, that the Ind., Cin. & Laf. R. R. Co. agreed to pay this interest. Why, therefore, are not the holders entitled to a decree against that company, for such interest?

Mr. Matthews, has made exhaustive reference to the record, to establish his propositions, and nothing more can be said on the subject.

D. THEW WRIGHT,
For Certificate Holders.

In the Supreme Court, U. S.
FILED,
MAR 16 1889
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers, Cincinnati.] [March, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

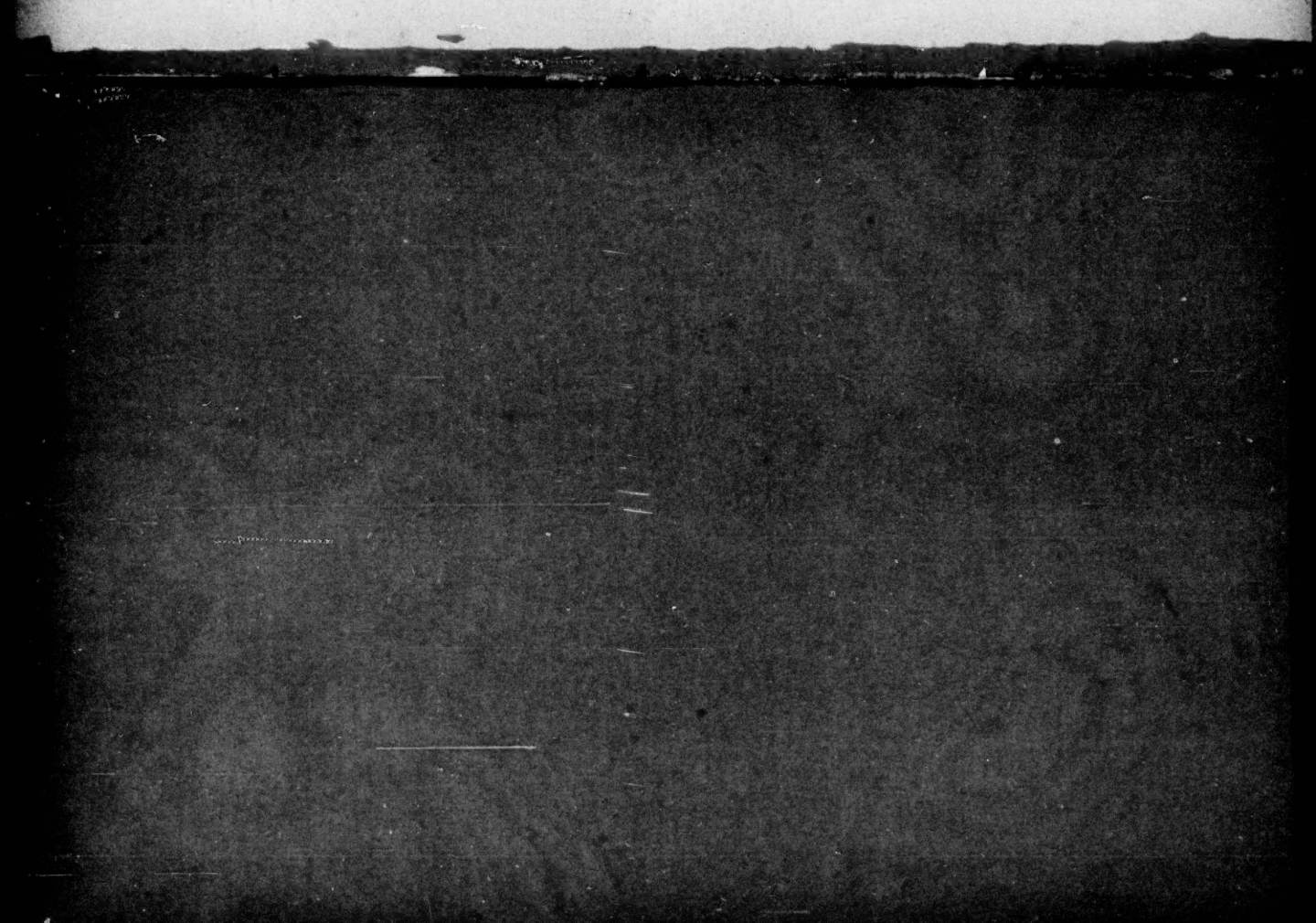
William D. Thompson and others,
Appellants,

No. 238.] *vs.*

The White Water Valley Railroad Company et al.

SUPPLEMENTAL BRIEF AND AFFIDAVIT.

C. B. MATTHEWS,
Of Counsel for Appellants.



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SUPPLEMENTAL BRIEF AND AFFIDAVIT.

Objection is made to the consideration of this case by the court, that the White Water Railroad Company, the real party in interest in the suit below, is not a party to this appeal. What occurred, as it seems from the record, was this: The appeal prayed and allowed was a general one. The White Water Railroad Company had intervened during the progress of the case below, and set up that it had become, through foreclosure proceedings, the purchaser of the property upon which the complainants in this case sought to enforce a lien. The original bill asked no relief whatever against The Indianapolis, Cincinnati and Lafayette Railroad Company. It asked an account and foreclosure of lien as against The White Water Valley Rail-

road Company. During the progress of the litigation, The Indianapolis, Cincinnati and Lafayette, and The White Water Valley Railroad Companies had become insolvent, and their respective properties were sold out in foreclosure proceedings. No testimony in this cause was produced touching the matter of account merely, so that, when The White Water Railroad intervened, it was the only party in interest, but was claiming through The White Water Valley Railroad Company, and no change was suggested or made in the title of the cause, or in the prayer for relief in the bill, but it still stood as a prayer against the original parties. The decree quieted the title of The White Water Railroad Company, so that it might be said that the last-named company was the only party to the case that had a decree in its favor. This fact was well known to all the attorneys of the defendants. When the citation was issued, by a misprision of the clerk, it was directed to the original parties, who were in the citation called the appellees, and was served upon one of the attorneys of record of The White Water Railroad Company, who was also one of the attorneys of record of The White Water Valley Railroad Company. The real objection is not that The White Water Railroad Company was not made a party to the appeal, but that the citation was irregular.

It does not matter that that company was not named upon the docket of this court as one of the respondents.

In *Adams* v. *Law*, 16 How. 144, which was a motion to dismiss an appeal grounded upon the fact that there was no case, as entitled on the record, and that the real parties interested in the case were not made parties to the appeal, it appeared that the entry below was as follows: "From which decree an appeal was prayed to the Supreme Court

of the United States, on the 18th day of December, 1872, and to them it was granted." The word "defendants" was omitted. The court say, "That must have been a clerical omission, as it appears that the appeal was granted to 'them,' that is to the defendants. The title of the case, as incorrectly entered on the docket of this court, may and should be corrected by the record filed. There is nothing in the record to show that the appeal by the defendants was not prayed by all of 'them,' and thereupon the motion was overruled."

To the same effect is *Miltenberger* v. *The Logansport Railway Company*, 106 U. S. 305.

In the case of *Hudgins* v. *Kent*, 18 How. 531, which was a motion to dismiss, on the ground that the appeal had not been regularly brought up, the court say that no clerical omission to enter the order could deprive a party of his right to appeal.

In *Bacon* v. *Hart*, 1 Black, 38, it is said, that service of citation on counsel is sufficient. The service of the citation in this case was perfectly proper. If a citation were issued against A and B, and served upon A only, it would not cure it by amending and inserting the name of B in the caption; but if it were directed to A alone, and was really intended for A and B, and service was actually made upon A and B, the citation could be made regular, by amendment, by inserting the name of B, and this would seem to be the test as to whether the citation was merely irregular in form, or whether there was no citation at all.

In the case of *Bigler* v. *Waller*, 12 Wall. 142, it appeared that the suit below was against certain parties who, during the pendency of the suit, died, and their representatives were accordingly made parties. Upon an appeal taken, the citation and bond were both to A and B, the

original parties. The acknowledgment on the citation was in these words: "I hereby acknowledge service of the within citation, James Alfred Jones, counsel for defendants in this cause in the Circuit Court of the United States in the District of Virginia." A motion was made to dismiss this appeal, on account of the irregularity of the citation, which was denied. The court, on page 147, says: "Undoubtedly the citation is irregular, as it should be addressed to the actual parties to the suit at the time the appeal was allowed and prosecuted. Where a party dies before the appeal is allowed and prosecuted, the suit should be revived in the subordinate court, and the citation, as a matter of course, should be addressed to the proper party in the record at that time. Notice is required by law, and where none is given, and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed. But the defect may be waived in various ways, as by consent or appearance, or the fraud of the other party. Service of the citation may be made upon the attorney of record of the proper party. Unquestionably the attorney of record may also waive service and acknowledge notice on the citation, as in that behalf he represents the party." The above-quoted language would seem to indicate that even if the citation were issued to the wrong person, yet, if served upon the attorney of record of the proper party, it would be a mere irregularity summarily amendable. The language in which the counsel accepted service was not of controlling importance in the decision of that motion. It did not require the attorney's acknowledgment of service to show the fact, because the ordinary return would have shown that. He does not say that he enters his appearance, or waives service, or accepts service. He simply acknowledges service. Neither

did it need the assertion of James Alfred Jones that he was counsel for the defendants in the cause, to establish that fact, for the record would also show that. The only pertinency, therefore, of the language used, would be that service was upon James Alfred Jones, in his capacity as counsel for the defendants, whom we may infer to be the real defendants, and not those who had ceased to be defendants by reason of death

In *Moore* v. *Simmons*, 100 U. S. 145, a motion was made to dismiss an appeal taken in the name of John T. Moore & Co. This was held to be amendable under section 1005 U. S. Rev. Stat., which did away with the authority of previously decided cases on that subject. The amendment in this case was equivalent to the insertion of new names, because John T. Moore & Co. could, in a writ, mean nothing more than John T. Moore, and the insertion of the names of the firm was the insertion of names of people who were not theretofore parties to the appeal, unless the intention to make them so under the designation of John T. Moore & Co. was simply an irregularity.

In *Davenport* v. *Fletcher*, 16 How. 142, one of the grounds of the motion to dismiss was that the citation was directed to the wrong person, and the motion was granted upon that, among other grounds, but with leave to apply for a reinstatement, although the time for the appeal, to wit, five years, had expired.

This citation may be looked at in two ways—in the first place, as a citation with the name of The White Water Railroad Company omitted, or as a citation in which that company is misnamed. It was perfectly well known to the counsel upon the other side that the only party that had a decree in its favor was The White Water Railroad Company; that the only thing in litigation was

the property which at the time of the decree belonged to that company; and that an appeal from that decree must have been necessarily an appeal against The White Water Railroad Company. In either event, whether it be a clerical omission of a party in the caption, or a misnomer, this court has the power to and will amend it, provided there is substantial compliance with the rules touching the service. The rule is that where a person is sued by the wrong name, but service is made upon the right party, unless the person take advantage of the misnomer by plea in abatement, or motion to quash the writ, he can not avail himself of the irregularity afterward, and even then it would be amended. The point about it is, who did the plaintiff intend to sue, and has that party had notice or been served with process?

In *Crofts* v. *Sikes*, 4 Gray (Mass.), 194, the court say:

"It can not change the principle on which amendments in the names of parties are allowed, that there is a person who happens to bear the same name with that erroneously inserted in a writ. Such a fact may render the question of allowing an amendment more perplexing and difficult to determine; but if, notwithstanding this, the person intended to be made a party, but who has been misnamed by mistake, can be 'rightly understood by the court,' the case clearly comes within the express provisions of the statute, and the error ought to be corrected by an amendment."

See *Kettlewell* v. *Watson*, 52 L. J. Chy. 818.
Moyle v. *Landers*, 20 Pac. Rep. 241.
Langmaid v. *Puffer*, 7 Gray, 378.
Osgood v. *Carver*, 43 Conn. 24.
Hearing v. *Ins. Co.*, 29 La. An. 832.

In the case of *Johnson* v. *Waters*, 111 U. S. 640, the court, at page 672, says:

"Some technical points have been made in the case, which we have examined and think untenable. One is, that after the decease of Oliver T. Morgan, Matthew F. Johnson was substituted in his place in the suit as dative executor of the said Oliver T. Morgan, and not as dative executor of Oliver J. Morgan. He was in fact both," etc. "Upon this bill a subpena was issued, commanding the marshal to summon Matthew F. Johnson, dative testamentary executor of Oliver T. Morgan, to appear and answer the bill of revivor. Matthew F. Johnson did appear, entering his appearance as 'dative testamentary executor of Oliver T. Morgan.' The subpena was a mere process to bring the defendant into court. When he came into court and read the bill of revivor, he was informed that he was called upon to answer as dative executor of Oliver J. Morgan. This was sufficient. From that day until the cause came here on appeal, he defended the case as representative of the estate of Oliver J. Morgan, and made no objection to the technical defect in the subpena. The defect was cured when he entered his appearance without raising the objection, and it is certainly too late to raise it now."

When the second appeal was asked for, it appears that an order was issued to show cause why the appeal should not be granted, which was served upon the attorney of record of The White Water Railroad Company, and he appeared in court. The second appeal was substantially granted at that time; but if not then granted, the order to show cause still remained open, and was not finally passed upon until the entry allowing the appeal was made. This is an appeal in open court.

See *Goddard* v. *Ordway*, 101 U. S. 745.
Goodwin v. *Fox*, 120 U. S. 775.

If it is correct to say that the difficulty is a mere

irregularity in the citation, it is too late to make such objection at the final hearing.

In the case of *McDonogh* v. *Millauden*, 3 How. 693, which was a writ of error to a state court, motion was made to dismiss on the ground that the writ was signed by the clerk and the citation by the judge of the state court. The case had been in this court for two terms, and the writ of certiorari had been sent down at the instance of the defendant to complete the record. The court say that the motion comes too late.

"If the errors had been assigned by the plaintiff here and joined by the defendant, no motion to dismiss for such a cause could be heard; and as no formal errors are usually assigned in this court, and none were assigned in this cause, we think the delay to make the motion is equal to a joinder in error, even if the clerk of the Supreme Court of Louisiana had no authority to issue the writ."

See also *U. S.* v. *Curry*, 6 How. 111;
United States v. *Yates*, 6 How. 608;
Buckingham v. *McLain*, 13 How. 150,

Where it is said, that the object of a citation is to give notice of the removal of the case, and such notice is waived by entering a general appearance by counsel. Where appearance is entered, the objection of want of notice is a mere technicality, and to be available, the party, at the time he appears, should give notice of his motion to dismiss, and that he appears for that purpose only.

Counsel for The White Water Railroad Company has entered his appearance generally, and has not moved to dismiss. The brief states that he inadvertently entered his appearance for The Indianapolis, Cincinnati, and Lafayette Railroad Company.

The entry is of an appearance for the appellees. I

think it may be safely said that the counsel did not think that he represented The Indianapolis, Cincinnati, and Lafayette Railroad Company, and did not intend to enter his appearance for that company; and that when he used the words appellees, he did not include The Indianapolis, Cincinnati, and Lafayette Railroad Company in that designation, but that he did intend to include the very party that he now claims is not represented in the appeal.

Respectfully submitted,

C. B. MATTHEWS,

Of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

William D. Thompson and others, Appellants,

No. 238.] *vs.*

The White Water Valley Railroad Company et al., Appellees.

AFFIDAVIT OF C. B. MATTHEWS.

State of Ohio, Hamilton County, ss.

C. B. Matthews, having been first duly sworn, says that he was one of the counsel for the appellants herein, in the court below; that, as such, he filed a petition praying a second appeal, as shown on page 63 of the printed record in this cause; that the order issued upon said petition on pages 62 and 63 of said printed record, was served upon Benjamin Harrison, one of the counsel of record of The White Water Railroad Company, as this affiant believes, and as is shown by the certificate of the clerk of said court hereto attached and marked "Exhibit A;" that, on May 22, 1885, this affiant addressed to the firm of Harrison, Miller & Elam, attorneys of Indianapolis, Ind., a certain letter, a copy of which is hereto attached, and marked "Exhibit B;" that the said Harrison and the said Miller were the same Harrison and Miller that were attorneys of record for The White Water Valley and The White Water Railroad Companies in this cause; that, on May 28, 1885, this affiant addressed and posted, to the same persons, another letter, of which a copy is hereto attached, marked "Exhibit C;" that, on the day designated in said last-named letter, this affiant appeared in the Circuit Court, at

Indianapolis, before Judge Woods, and there was present Mr. W. H. H. Miller, one of the attorneys of record in said cause for said railroad companies, and no cause was shown why said new appeal should not be granted, but Judge Woods stated, as his opinion, that no second order was necessary, as an appeal had already been taken, and it was further stated by the court that upon the presentation of a bond in the sum of $350.00, with sufficient sureties, said bond would be approved, and the citation issued, but that if, upon presentation of the bond, an entry allowing the appeal should be found necessary, it would be made, and that the petition for the second appeal was unnecessary, and it was suggested that the same should be dismissed without prejudice, the latter part having been added for the purpose of showing when an entry should finally be made if thought necessary, that the court had not previously passed adversely upon the application; that afterward, upon January 21, 1886, this affiant submitted certain authorities to the court, showing that an entry was essential, and thereupon it was made, allowing a general appeal, and a direction was given upon the same date, to wit, January 21, 1886, to issue a citation for the defendants, which was issued; that the decree in the cause below was drawn by Judge C. C. Hines, one of the firm of Harrison, Hines & Miller, and one of the attorneys of record of The White Water Railroad Company; that the appeal allowed was a general appeal, and it was intended to designate and serve The White Water Railroad Company as an appellee; that, on the 10th day of January, 1889, this affiant addressed a letter to Harrison, Miller & Elam, a copy of which is hereto attached, marked "Exhibit D," and received in answer the letter hereto attached, marked "Exhibit E;" that thereafter, on January 21st, affiant ad-

dressed a letter to Messrs. Miller & Elam, a copy of which is hereto attached, and marked "Exhibit F," and received in answer the letter hereto attached, marked "Exhibit G;" that the irregularity in the citation was not discovered by this affiant until the record of this appeal had been printed.

C. B. MATTHEWS.

Sworn to and subscribed before me, this March 11, 1889.

[SEAL.] CHARLES THEODORE GREVE.

Notary Public,

Hamilton County, Ohio.

"EXHIBIT A."

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

NOVEMBER TERM, 1884; APRIL 25, A. D. 1885.

Before Hon. William A. Woods, Judge.

William D. Thompson et al.

No. 331.] *vs.* [*Chancery.*

The White Water Valley Railroad Co. et al.

Come now the complainants, and show to the court that, on the 10th day of June, 1884, a final decree was rendered by this court dismis-ing their bill for want of equity; that they prayed an appeal from said decree, which was granted, and they were required to execute, within sixty days thereafter, their bond upon such appeal, in the sum of $350; that said appeal has never been perfected, and they pray that a new appeal may now be allowed; and the court, having considered their said petition, doth now order that the defendants herein be and they are hereby cited to appear, and show cause, if any they have, on or before the 12th day of May, 1885, why the prayer of said petition should not be granted, and the clerk is directed to issue to the marshal a certified copy of this order for service upon the defendants or their attorneys of record in said cause.

United States of America, District of Indiana, ss:

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of an order made and entered in said court in

the above entitled cause, on the 25th day of April, 1885, as fully as the same appears of record in my office.

Witness my hand and the seal of said court, this 4th day of May, A. D. 1885.

[SEAL.] NOBLE C. BUTLER,
Clerk.

Served at Indianapolis, May 5, 1885, by reading it to Benj. Harrison, member of the firm of Harrison, Miller & Elam, attorneys of record for defendants herein.

ROBERT S. FOSTER,
U. S. Marshal.
By CHAS. FISKE,
Deputy.

United States of America, District of Indiana, ss:

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of a certified copy of an order to show cause, issued out of the office of the clerk of said court, on the 4th day of May, 1885, to the marshal of said district, in the cause of *William D. Thompson et al.* v. *The White Water Valley Railroad Company et al.*, No. 3311, and of the return of service of said marshal indorsed thereon, returned and filed in said court on the 20th day of May, 1885, as fully as the same remains on file in my office. And I further certify that Benj. Harrison, and W. H. H. Miller, and C. C. Hines, are solicitors of record for The White Water Railroad Company, one of the defendants in said cause.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 25th day of February, A. D. 1889.

[SEAL.] NOBLE C. BUTLER,
Clerk.

"EXHIBIT B."

May 22, 1885.

MESSRS. HARRISON, MILLER & ELAM,
Attorneys,
INDIANAPOLIS, IND.

Gentlemen—Judge Wright and myself have filed a petition for allowance of an appeal in the old Hagerstown case, at Indianapolis. The return day of the citation was the 12th inst.

The clerk informs me that on that day you asked delay until you could see your client.

Will you kindly inform me when the matter can be heard?

Very respec'y,
C. B. MATTHEWS,
M.

"EXHIBIT C."

May 28, 1885.

MESSRS. HARRISON, ELAM & MILLER.

Gentlemen—I shall be in Indianapolis at 12:30, Saturday, to see Judge Woods about the White Water case. Possibly Judge Wright will accompany me.

Very respectfully,
C. B. MATTHEWS,
M.

"EXHIBIT D."

Jan. 10, 1889.

MESSRS. HARRISON, MILLER & ELAM,
Attorneys at Law,
INDIANAPOLIS, IND.

Gentlemen—In the case of *Thompson* v. *The White Water Valley R. R. Co.*, now pending in the U. S. Supreme Court, will you agree to a stipulation as to value of the part of the road between Cambridge city and Hagerstown, so as to maintain the jurisdiction of the Supreme Court? Otherwise, it will put us to the necessity of getting affidavits.

Respectfully yours,
C. B. MATTHEWS,
Per C. T. GREVE.

"EXHIBIT E."

W. H. MILLER. JOHN B. ELAM.

LAW OFFICE OF MILLER & ELAM,
3, 4, 5, & 6 WRIGHT'S BLOCK, MARKET ST.,
INDIANAPOLIS, IND., *January* 12, 1889.

C. B. MATTHEWS, ESQ.,
CARLISLE BUILDING, CINCINNATI, O.

Dear Sir—Your note of the 10th inst., asking me to make a stipulation with reference to the value of the Hagerstown Branch, or the road between Hagerstown and Cambridge City, is received. We do not see any objection to making the stipulation, but before we do so, we would be glad to see your brief. We have not examined the record as yet, as we have been waiting to get a copy of your brief. If you will send that to us, we will examine it at once, and consent to the stipulation, unless we find upon examina-

tion that the same is inconsistent with our duty to our clients. Please let us hear from you at once.

Yours, very truly,

MILLER & ELAM.

"EXHIBIT F."

January 21, 1889.

MESSRS. MILLER & ELAM,
Attorneys at Law,
INDIANAPOLIS, IND.

Dear Sir—Will you kindly let me know, at your very earliest convenience, what determination you have arrived at as regards the stipulation in the case of *Thompson* v. *White Water Valley R. R.*, as I desire to know what course to take in the matter, and the time for hearing is drawing near.

Yours resp'y,

C. B. MATTHEWS,
Per C. T. GREVE.

"EXHIBIT G."

W. H. H. MILLER. JOHN B. ELAM.

LAW OFFICE OF MILLER & ELAM,
3, 4, 5, & 6 WRIGHT'S BLOCK, MARKET ST.,
INDIANAPOLIS, IND., *January* 23, 1889.

C. B. MATTHEWS, ESQ.,
CINCINNATI, OHIO.

Dear Sir—Your favor of the 21st inst. is at hand. We do not understand wherein is the necessity for any stipulation as to the value of this property. We know nothing of its value as matter of fact. It seems to us that the record shows clearly enough for all purposes of jurisdiction that the eight miles between Hagerstown and Cambridge City is worth more than $5,000; at least, we do not

propose to question that fact. Under the circumstances, therefore, we prefer not to make the stipulation you ask. You understand, of course, that we have never had any employment, and do not at all represent The Indianapolis, Cincinnati and Lafayette Railroad Company. We observe by the record that The White Water Valley Railroad Company, and The Indianapolis, Cincinnati and Lafayette Railroad Company, are the only appellees. The citation was served on us as solicitors for The White Water Valley Railroad Company.

We are much obliged for your memoranda of points and authorities.

Yours very truly,

MILLER & ELAM.

Office Supreme Court U. S.
FILED.
FEB 27 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1888.

WILLIAM D. THOMPSON, AND OTHERS, *Appellants.*
vs.
THE WHITEWATER VALLEY RAILROAD COMPANY AND THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD COMPANY, *Appellees.*

No. 238.

W. H. H. MILLER,
Solicitor for White Water Valley R. R. Co.

FRANK H. SMITH, INDIANAPOLIS.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1888.

WILLIAM D. THOMPSON, ET. AL,
Appellants.
vs.
THE WHITEWATER VALLEY RAILROAD COMPANY AND THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD COMPANY,
Appellees.

No. 238.

In this case, the undersigned by inadvertence entered an appearance and receipted for a copy of the Record, as counsel for both of the appellees. This was purely an inadvertence, as the undersigned never had any employment from the Indianapolis, Cincinnati & Lafayette Railroad Company, or authority to appear for that Company in any way.

It is therefore desired that the appearance be limited accordingly.

Of this mistake, so soon as it was discovered, the undersigned notified the Clerk of this Court. The notification that I did not appear for The Indianapolis,

Cincinnati & Lafayette Railroad Company was sent to counsel for the appellants on January 23d, and to the Clerk of this Court some days earlier.

STATEMENT OF FACTS.

The White Water Valley Railroad Company being duly incorporated for the purpose of building a railroad from Hagerstown, Wayne County, Indiana, to Harrison, Dearborn County, for the purpose of raising money to enable it to build its road, on August 1, 1865, executed its mortgage to secure one million dollars of its bonds, mortgaging "all the said railroad and all its right of way," etc., "rights and privileges now or hereafter appertaining to said road." The mortgage contained the usual covenant embraced in such instruments, to execute and deliver any further suitable conveyance for the more perfect assurance of any property hereafter acquired and included in the description of the deed.

(Record, p. 8, lines 1 to 5; also Record, pp. 55, 56 and 62; also evidence of Prentiss, p. 65.)

In July and August, 1867, the company had acquired considerable of the right of way by contracts and deeds with owners of property along the line of the road between Cambridge City and Hagerstown—a distance of seven miles—and it is to be inferred from the evidence that the line had been definitely located. It had also received promissory notes, &c., by way of donation, to aid in the construction of this line, which were used in the acquisition of right of way along it.

[Transcript, p. 133. See testimony of Williams.]

Nov. 4, 1867, the White Water Valley Railroad Co. and the Indianapolis, Cincinnati & Lafayette Railroad Company entered into a contract of perpetual lease—

the White Water Valley Company leasing its entire line —complete and incomplete—between Hagerstown and Harrison—to the I., C. & L. Co., the instrument of lease describing the property leased as *the line owned* by the W. W. V. Co. between Harrison and Hagerstown not completed beyond Cambridge City, the "line" being encumbered by the mortgage of $1,000,000, above named. The agreement provides in the first section for possession by the lessee, and the W. W. V. Co. *covenants against the mortgage.* (Record, pp. 7 to 11.)

This agreement provides for payment of the interest on the mortgage debt out of the rent, and also for resumption of possession by the lessor if the lessee fails to keep covenants.

The fourth article of the agreement provides that the I., C. & L. Co. shall, under the W. W. V. charter, complete the latter's railroad, and shall be entitled to all its profits and earnings perpetually which are *guaranteed* to the I., C. & L. and its assigns, and said I., C. & L., in case of its completion of the road, is to pay no further compensation to the W. W. V. Co. than is provided for the whole road. This compensation is fixed at $140,000 a year, by another article of the agreement. The I., C. & L. has the right to adopt any reasonable plan, and employ suitable persons for such construction, with power to use name and corporate powers of the W. W. V. Co. in construction and procuring right of way, and is also to have the benefit of all donations to the W. W. V. Co.

The annual rental and possession commenced under this agreement on the day of its date.

On Dec. 7, 1867, the I., C. & L. made a contract with Lord & Smith for the construction of the uncompleted section of road. This agreement recited the right of the I., C. & L. to the perpetual use and possession of

the railroad from Harrison to Hagerstown, under the agreement above named, and the right to construct the uncompleted portion of the road, and provided that the I., C. & L. Co. should furnish to Lord & Smith, without charge, any right of way or conveniences that company had along the portion to be constructed, and that they, Lord & Smith, should have the benefit of any donations, &c., theretofore, or which thereafter might be made. (Record, p. 11.)

In payment said I., C. & L. Co. was to issue its obligations, transferable on its books only, to amount of $205,000, irredeemable but with semi-annual interest forever at eight per cent per annum.

The seven miles was completed,—for a large portion upon right of way acquired by the W. W. V. Co. before the contract of Nov. 4, 1867, and upon rights acquired with promissory notes of persons along the line, given to the W. W. V. Co. before the contract, and probably, although there is no evidence directly upon the point, upon some rights of way donated to the W. W. V. Co while the work was being constructed. At all events all right of way acquired was in the name of the W. W. V. Co., and not a dollar was directly or indirectly paid by Smith & Lord for any right of way. They did, however, pay Mr. Williams $200 for acting as their agent in reference to securing right of way, and owe him something besides. His services he testifies were rendered in July, August and September, 1867—three months before the contract of Lord & Smith with the I., C. & L., and two months before the contract of lease, &c., of the W. W. V. Co. to the I., C. & L. Co.

(Evidence of Williams, p. 131–133.)

The cost of the work was $110,000.

(Evidence of Lord, p. 131.)

The certificates were issued under the Lord & Smith contract to the amount of $205,000. (Bill, p. 3)

April 23, 1868, after a large amount of certificates had been issued under the contract, the *I., C. & L. Board of Directors* passed a resolution to the effect that the holders of the certificates should have a perpetual lien on the earnings and income of the section built under the contract. (Bill, p. 3.)

On *July 12, 1869* the Board of Directors of the W. W. V. Co. caused a resolution of ratification of the contracts of Nov. 4, 1867, and Dec. 7, 1867, to be entered on their corporate records, the entry stating that the several contracts had been approved and adopted Oct. 30, 1868, by the stockholders, but if approved by the Board before July 12, 1869, no record had been made. (Record, p. 13.)

At the same meeting of July 12, 1869, a resolution of the Board reciting the I., C. & L. resolution of April 23, 1868, in reference to a perpetual lien on income and earnings of the eight mile section, was introduced and passed, confirming the action of the I., C. & L. Board, and directing the president to join in any instrument securing the lien.

Nov. 20, 1868, the I., C. & L. Co. executed, under its resolution of April 23, 1868, an agreement granting to the holders of certificates a perpetual lien on or pledge of the income and earnings of the seven mile section to secure the interest on the certificates. (Record, p. 120.)

July 10, 1869, both companies, the I., C. & L. and the W. W. V., united in an instrument or deed of trust, to secure the lien to holders of certificates, and *reciting* agreement of Dec. 7, 1867, and a further agreement between the two companies and Smith & Lord, that hold-

ers of the certificates should have such a lien made before advancing the money to construct the road. This agreement is dated April 24, 1868, but as the bill alleges and the facts connected with it show, it was not executed until July 10, 1869—and that date was before the authority conferred by the W. W. V. Board at its meeting of July 12, 1869. (Record, pp. 116, 117, 118.)

There is no proof of any such agreement as is recited in the deed of trust last referred to, and no consideration is shown for any such deed, except the recitals in the deed itself. The answer denies any consideration, and the actual consideration as shown in the proof is in the contracts of Nov. 4 and Dec. 7, 1867.

All the contracts and deeds executed between the two companies, and between either of them and Lord & Smith, were executed, on behalf of the W. W. V. Co., by either Lord, who was president, or by its vice president,—Lord being the president of both companies, and acting for each and for himself as occasion offered.

The I., C. & L. Co. failed in 1870, and under a contract between it and the W. W. V. Co. the W. W. V. Co. resumed possession of its entire road, January, 1871, and agreed to pay certificate holders *three* per cent. per annum upon the certificates, instead of *eight*.

The bondholders, under the mortgage of August 1, 1867, brought suit Jan. 25, 1875—after the commencement of this suit—the mortgage was foreclosed in the U. S. Circuit Court for Indiana, the entire road sold, and under the sale the White Water Railroad Company became the owner and is in possession of the line mortgaged from Harrison to Hagerstown.

(Decree Circuit Court, p. 62.)

As matter of fact, one of the "stipulations of counsel" referred to in the decree of the Circuit Court on page 62 of the record, none of which stipulations, however, are embodied in the transcript here, was to the effect that the record in the suit foreclosing the mortgage referred to in the answer of the White Water Railroad Company on the bottom of page 55 and top of page 56 of the record, being the mortgage of the White Water Valley Railroad Company for a million dollars foreclosed at the suit of Storrow and others, and under which the White Water Railroad Company acquires title, should be considered a part of the evidence in this cause, the record of that foreclosure being in the same court.

On page 56 of the record, at line 4, the answer of the White Water Railroad Company purports to exhibit a copy of that mortgage, but it is not found in the transcript. However, these omissions are perhaps not very important, as the mortgage, its foreclosure, and the acquisition of title thereunder by the White Water Railroad Company, being shown in the answer and being no where denied by the complainants, are of course admitted, so that these facts are undisputed in the record.

The complainants filed an amendment to their bill after this answer setting up these facts was filed, but that amendment makes no reference to this mortgage, but thereby admits all the averments of the answer in reference thereto. (Record, p. 60.)

ARGUMENT.

I.

That appellants cannot have a reversal of this decree is too clear for argument, because the real party in

interest, the party owning and in possession of the property on which appellants seek to fasten the lien, the party in whose favor the decree was made below, is not in court on this appeal.

The White Water Valley Railroad Company, a corporation of Indiana organized in 1865, was authorized by its charter to build a railroad from Hagerstown, Wayne County, Indiana, by way of Cambridge City and Richmond to Harrison in Dearborn County, Indiana, a distance of sixty-five miles. (See Bill, Trans. p. 2.)

In 1867, before complainants' claims had any existence, the White Water Valley Railroad Company executed a mortgage upon its property, including all its then acquired and thereafter to be acquired property, as security for the payment of bonds to the amount of one million dollars, then issued and sold by the company.

(See Plea of Henry Parkman, p. 49, and Answer of the White Water Railroad Company, pp. 55, 56, 57, also the Decree of the Court, pp. 61 and 62.)

In 1878 this mortgage was foreclosed, and the property sold to a purchasing committee, who organized a new corporation known as the White Water Railroad Company, which became the purchaser and owner of the property under the foreclosure.

(See Answer of the White Water Railroad Company on pp. 51 to 58, also Decree of the Court, pp. 61 and 62.)

This suit was commenced by the appellants against the White Water Valley Railroad Company and the Indianapolis, Cincinnati & Lafayette Railroad Company in 1873. On the 7th day of May, 1879, after the foreclosure above named, and after the White Water Railroad

Company had become the owner of the property in controversy, that corporation was admitted as a party defendant to this suit and filed its answer as such.

(See Trans., pp. 50, 51, &c.)

From that time forward, the White Water Valley Railroad Company ceased to be a factor of prime importance in the litigation, because all of its property, including the eight miles between Hagerstown and Cambridge City upon which complainants, by this suit, were seeking to fasten a lien, had passed from it to its successor, the White Water Railroad Company.

Accordingly, the decree of the Circuit Court, commencing on page 61, finds that: "The whole of said line of railroad extending from the town of Harrison in Dearborn County to the town of Hagerstown in the County of Wayne, and State and District of Indiana, including the portion thereof lying and extending between the city of Cambridge City and the town of Hagerstown in the county of Wayne aforesaid, being the same portion thereof named in the original, amended and supplemental bills of complainant, is now owned and possessed by the defendant, the White Water Railroad Company, under the mortgage of the White Water Valley Railroad Company, of date August 1, 1865, to William Dwight, Thomas Dwight and Daniel Thew Wright, Trustees, to secure the holders of bonds issued thereunder, (which mortgage was duly recorded in Wayne County aforesaid,) and under and by virtue of the foreclosure thereof, which mortgage was executed, acknowledged, delivered and recorded before the contracts of December 4, 1867, and before the claims of the complainants originated, and of which they had notice before the existence of their said claims; and that the

only equitable relief to which complainants are entitled is a possible right to redeem from said mortgage."

Thereupon the court ordered and decreed that the complainants should have thirty days in which to commence proceedings to redeem from the White Water Railroad Company, and that in default of such proceedings the bill should be dismissed: and the complainants declining thus to redeem, the bill was dismissed for want of equity.

It thus appears, as already stated, that the real and only real party in interest in the litigation, from the time the White Water Railroad Company became a party, and the only real party in interest to uphold this decree on this appeal, is the White Water Railroad Company. And that party not being named as appellee and not being present in this court at all—that decree cannot be affected by anything done here.

Of course, this is elementary, and a citation of authorities is unnecessary, yet this court has decided this precise question.

Terry v. *Abraham*, 93 U. S., 38.

II.

But it the court should go to the merits, appellants would fare no better. The contract of Nov. 4, 1867, which is the foundation of these alleged liens, being a lease of one Indiana railroad to another, is void.

Pennsylvania R. R. v. *St. Louis, &c.*, 118 U. S., 290.

This contract falling, the superstructure falls.

III.

There was no consideration for the execution by the White Water Valley Railroad Company of the deed of trust made to secure the holders of the "Hagerstown Association Certificates."

This deed was executed by the White Water Valley Company July 10, 1869, although dated April 28, 1868, as averred in the bill. The acknowledgment is dated July 10, 1869. (p. 118.) The authority of the Board of Directors was by the resolution of July 12, 1869.

The certificates had then long been issued and were the personal obligations of the I., C. & L. Co., providing for no lien, and no provision for a lien is disclosed by any agreement in proof—either oral or written.

So that unless there was an original lien for these advancements, there was no ground or consideration for the W. W. V. Co. creating one. An attempt had been to create one by the I., C. & L. Co., April 28, 1868, but as the title to the right of way was wholly in the W. W. V. Co., it was no doubt considered, as it really was, ineffectual to that end.

It is true that under the contract of Nov. 4, 1867, between the two companies, the I., C. & L. had the right to "adopt any reasonable plan and employ suitable persons for such construction," but, as we shall show hereafter, such a provision could give no right to the latter to mortgage the rights of way or any part of the line or property of the W. W. V. Co., nor was any such claim of right made, or any provision for a lien for money advanced by the I., C. & L. or its contractors provided for in the contract of Dec. 6, 1867, between the I., C. & L. and Smith & Lord, contractors. No title to any right of way was acquired by these contractors in the construction of the seven miles of road. It is clear that they and those who purchased the certificates issued under the contract expected no security beyond the personal liability of the I., C. & L. Co.—and none was attempted

from even that company until the greater part, if not all, the $205,000 of certificates had been issued.

There was, then, no original agreement for a lien.

Was there any lien existing in favor of the contractors in the nature of a vendor's lien?

Williams testifies that nothing was paid for the right of way except notes originally given to the W. W. V. R. R. Co. in the way of subscriptions or donations to aid the road. (P. 133.) If the $200 paid him by Smith & Lord for his services along the line, and the $500 they promised to pay but did not, are taken together, the total amount is $700, but these services were not such as to create a vendor's lien in favor of the contractors. And if Williams, who is complainants' witness, is to be believed, and his testimony is not disputed, these sevices were rendered months before even the original contract of lease between the two companies was executed, If, as Lord testifies, he employed Williams then for the purpose, having such a contract in view, and in the contract did not provide for reimbursement for such preliminary expenses,—no doubt incurred to see whether the scheme was practicable, before venturing on it—no claim of a vendor's lien or anything of like nature can be predicated on it.

It is true as a principle of law that if this right of way came to the W. W. V. with vendors' liens on it, all such liens were preserved for the benefit of the vendors. But Lord and Smith were in no sense vendors of the rights of way to the W. W. V. Co. We have shown the consideration which passed for them. Upon this "slender thread" of having employed an agent to secure right of way by the use of the chartered privileges of the company, paying nothing but the company's

property for it, can hardly "hang the everlasting things" of these perpetual irredeemable certificates.

IV.

The line of railroad, complete and incomplete, between Harrison and Hagerstown, was at the date of the agreement of Nov. 4, 1867, between the two companies, the property of the W. W. V. Co. (P. 7, Ex. A.)

This is distinctly recognized in the agreement, and the right of property never changed. Indeed, it might well be questioned whether it could be changed. The agreement was an agreement of lease. By its provisions the W. W. V. Co. had the right to reassume possession at any time upon default in payment of the rent. But the possession of the I., C. & L. Co. being that of a tenant or lessee, when the W. W. V. Co. took possession, it gave no creditor of the I., C. & L. Co. any rights as against the W. W. V. Co.

As if A leases to B for a term of years, and B places improvements for which he has not paid, and the mechanic has taken his lien for security, it cannot be said that A's resumption of possession, upon breach of covenant, makes his property subject to the lien—even for the unexpired term—or the term which, but for the breach, would have been an unexpired term.

So a lessee might mortgage his term, but the resumption of the lessor's possession, for breach, &c., would not be a possession subject to the lessee's mortgage.

We hardly think it necessary to cite authority to this point. None of the cases cited by the learned counsel for complainants touch the question, for the reason that there is no similarity in the facts, and the principles

of law underlying this case are not applicable to the facts of the cited cases, or *vice versa*.

So we insist that even as to the W. W. V. Co. if not bound by its express lien by deed—which we have shown was executed without any consideration—its acquisition of the completed road under the terms of the lease was not such an acquisition of encumbered property—encumbered by vendors' liens—as entitles the complainants to any relief upon their bill; and certainly as to an express lien by virtue of the deed of trust of July 10, 1869, the complainants are not entitled to the relief sought.

V.

But even admitting for the sake of argument that Lord and Smith had vendors' liens which they might assign, yet the action of the parties in accepting *first* the personal obligation of the I., C. & L. Co. in payment, and *second* the mortgage of that company (April 24, 1868) would be sufficient to defeat the equitable lien. A mere agreement to receive a mortgage will not defeat the lien, but a mortgage, or any other express security or lien, whether given in pursuance of the contract of sale or by subsequent agreement, is a waiver of the vendor's lien.

Fox, Adm'r v. *Fraser*, 92 Ind. 265.

So far, then, as the question of the complainants' rights as the holders of *vendors' liens* upon this property is concerned, we think it fully shown that they have no rights.

VI.

1. It is not necessary to discuss the question whether a railroad mortgage can cover subsequently acquired property, or to refer more than incidentally to

the principles of law under which it is, as Jones on Railroad Securities says, "a proposition almost universally maintained by recent authorities, both English and American, that such a mortgage does cover such property."

In this case the property acquired by the W. W. V. Co. subsequently to the mortgage of Aug. 1, 1865, under which the White Water Railroad Company is now holding, was in great part acquired not only before the subsequent mortgage of July 10, 1869, but before the contract of Nov. 4, 1867, under which complainants claim. That contract expressly recognized the mortgage of Aug. 1, 1865, as covering the entire line—and the personal guarantee of the W. W. V. corporation was taken against it.

That this guaranty was considered ample the facts of the case show. A corporation with only $80,000 a year fixed charges, leasing its property at $140,000 a year, was solvent enough to make its guaranty acceptable, especially when the terms of the lease provided for a sinking fund which would discharge the mortgage in a reasonable time.

2. Apart from the record of this mortgage in the various counties through which the line runs, there was full notice of its existence to all the holders of the Hagerstown certificates. So that there can be no claim,—and in fact is none—that the holders of these certificates were not fully informed of all the rights, legal and equitable, of the first mortgage bondholders.

Nor is it disputed that the subsequently acquired property was appurtenant to the railroad line of the W. W. V. Co.

The certificate holders cannot complain of the position in which they placed themselves.

The case of *Dunham* v. *Railway Co.*, 1 Wallace, 254, fully disposes of the suggestion of counsel that *possession* resumed by the W. W. V. Co. became chargeable with all intermediate liens, even were the suggestion not thoroughly defeated on principle. In that case the contractor was to retain possession of the section built by him until he was fully paid, but the Supreme Court held that such an agreement was subject to the prior mortgage.

In *Galveston Railroad* v. *Cowdrey*, 11 Wallace, 459, the whole subject of the effect of railroad mortgages upon subsequently acquired property is discussed. We call the especial attention of the court to the doctrine enunciated in that case. "Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing a railroad, yet if it assumed to convey and mortgage the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property as they came into existence would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases."

See that case, pp. 480, 481.

The principle is also fully recognized in the case of *United States* v. *New Orleans R. R.*, 12 Wall., 362.

See also *Willink* v. *Morris Canal Co.*, 3 Green N. J. Ch. Rep., 379,—in which case the point is made that the right of way had not been obtained when the mortgage was executed—a point which the court held to be immaterial.

And see *Pennock* v. *Coe*, 23 Howard, 117, and *Butt* v. *Ellett*, 19 Wallace, 544.

This court has reaffirmed the doctrine for which we contend, in *Porter* v. *Pittsburgh Steel Co.*, 122 U. S., 267.

We have by no means cited all the cases supporting this doctrine, for the reason that we deem it unnecessary.

The cases relied on by the complainants are all substantially to the effect that a railroad company coming into possession of property the mortgagee takes it *cum onere*. We do not dispute this proposition. In the Scholl case, Scholl retained the ownership of the cars until they were paid for; it was a case of conditional sale. In the case of *Coe* v. *R. R. Co.*, 34 N. J. Eq. Rep., the rights in question were not contemplated at the time of giving the mortgage, and the charter powers of another company were used to acquire the right of way. In *Loomis* v. *R. R. Co.*, 17 Fed. Rep., there was a vendor's lien upon the after acquired property—a lien that is always held a prior one as to such property, as we have stated above.

The manuscript decision of Judge Drummond, is a case of occupancy by another railroad of a part of an unfinished and *abandoned* road,—occupation by an independent company,—and Judge Drummond doubted whether, in such a case, more than the value of the expenditure of the original company—the original mortgagor—could be claimed by the original mortgagees.

But all these cases differ from the case at bar. It is not shown here that the I., C. & L. Co. or Lord and Smith ever acquired any new right of way for any new consideration—or any consideration which did not move from the W. W. V. Co. And the taking of the express lien by deed of trust was a waiver of all rights and claims of original lien, and was a second one. The an-

swer concedes that if this lien was a valid one, which is denied, the complainants may have a right of redemption, but this the bill does not seek, and not seeking it has no equity.

As to the argument of *lis pendens*, as we understand the law, the commencement of this suit is only notice of complainants' claims—not an admission.

W. H. H. MILLER,

Solicitor for White Water Valley R. R. Co.

Office Supreme Court U. S.
FILED,
APR 3 1889
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

WILLIAM D. THOMPSON and Others
vs.
THE WHITEWATER VALLEY RAILROAD COMPANY AND THE INDIANAPOLIS, CINCINNATI & LAFAYETTE RAILROAD COMPANY. } No. 238.

In the supplemental brief for appellants, to meet the objection that the Whitewater Railroad Company, the most important party in interest, is not before the court, the case of Adams *v.* Law (16 Howard, 144) is cited. That case is easily distinguishable from the case at bar. There the appeal was properly taken, and the only objection was that the appellants were not all named in the transcript. The record showed they had all prayed an appeal, but by a clerical omission their names did not all appear as appellants. It was held by this court that the clerical omission might be corrected. Here, on the other hand, it was perfectly competent for appellants to appeal as against one or two or all of the defendants; and in order to make an effective appeal against any of them, the appeal being after the term, it was essential that the appellees be brought into court, either by citation or voluntary appearance. The citation is directed to two of the defendants only; it is served on them only. There is no appearance here for any one except the appellees brought into court and named in the record. The statement made in the supplemental brief that counsel for the defendants well knew that

the Whitewater Railroad Company was the real party in interest in that decree is wholly immaterial. Our views of the case from the beginning have been radically different from those of appellants' counsel, and it was not for us to assume to understand their case better than they did themselves. It did not seem to us at any time that they had a good case against any of the parties. Still, that was for them to determine, and not for us, and we were not at liberty to assume that they were not acting advisedly in pursuing their appeal against the Whitewater Valley Railroad Company instead of the Whitewater Railroad Company.

The case of Miltenberger *v.* The Logansport Railway Company (106 United States, 305) is also cited. In that case there was an appeal in term; no citations were necessary; and it was held that all of the appellees who were intervening claimants were in court. We cannot see any analogy between that case and this. Hudgens against Kent (18 Howard, 531) was also an appeal in term, and the question was not whether the parties were in court, but whether in absence of an order showing an appeal the court had jurisdiction. It was held that failure of the clerk to enter an order, which was taken in open court, could not deprive appellants of their rights.

Bacon *v.* Hart (1 Black, 38) is also cited to the point that service on counsel is sufficient. This we do not controvert. The service of the citation here is undoubtedly good for the parties named in the citation, but it is nowhere held, and, we think, never would be held that a citation served on counsel brings any one into court except the parties named in the citation. To so hold would be to say that a citation directed to AB, and served upon his counsel would be good to bring CD into court if both parties happened to have the same counsel.

Bigler *v.* Waller (12 Wallace, 142) is clearly not in point. There the citation was directed to the original party to a suit, when it should have been directed to his personal representative, the original party having died, but the counsel of the original, as well as of the new party, had acknowledged service of the citation for the "Defendants in this cause, in the Circuit Court of the United States for the District of Virginia." It was held that having signed that certificate the "point was waived by the circumstantial language of the certificate signed, without objection by the attorney of record in the Circuit Court." There is no pretense of any such waiver here; the citation here was directed to two of the three defendants, was served by the marshal upon counsel as counsel for such defendants as were named in the citation, and for no others. (See Record, page 64.)

In Moore *v.* Simonds (12 Wallace) the appeal had been taken in the name of the firm, but was in all other respects regular. The record showed the names of the individual members of the firm, and permission was given to insert their names as parties, a very different proposition from bringing in a new party upon whom no citation has ever been served.

In Davenport *v.* Fletcher (16 Howard, 142) the citation was directed to a wrong party, and the writ of error was dismissed. It was said, however, that leave was granted to move its re-instatement. That is true; but what was the result of that motion we are not advised.

The suggestion is again urged by counsel that we ought to have known that they meant to appeal as against the Whitewater Railroad Company, as that was the only party against whom they had any cause of action. We answer again that it always seemed to us they had no cause of action against either company—the Whitewater Railroad Company or the Whitewater Valley Railroad Company, but we were bound to assume that

they were acting understandingly, and we were not permitted to judge of the reasonableness or unreasonableness of their course. We have tried to meet them where they have chosen their ground, and if they have not chosen it wisely the fault is not ours, but is their mistake. The suggestion that we should have taken our objection by plea in abatement or motion to quash the writ is idle; as, against our client, the Whitewater Valley Railroad Company, their citation was good, we were properly in court, and a plea in abatement would have availed nothing. Besides, the objection we make appears on the face of the record.

Counsel for appellants saw fit to prepare their record without giving us any notice, without any opportunity on our part to see that the record was complete, that the evidence and stipulations upon which the trial was had were properly set forth; and if they, taking this course, have not got a record which will do them any good it is their misfortune. As a matter of fact the record is not complete; the copy of the mortgage referred to in the contract upon which they relied, which is made an exhibit to the answer of the Whitewater Valley Railroad Company, and also of the Whitewater Railroad Company, (see Record, page 66, line 4), is not set out in the record, as we have shown in our original brief. The stipulations upon which the case was tried are also omitted, as is also the record in the foreclosure case referred to on page 57 of the record at line 7, and which, as I am assured by the counsel who tried the case, was received in evidence. That it was so received is confirmed by the decree of the court on page 62 of the record. Having thus brought up their record without giving to counsel for defendants any opportunity to verify the same or make any suggestions as to what it should contain, we insist that appellants shall stand by the record as they have brought it here.

The case of Johnson against Waters (111 United States, 640) bears no analogy to the case at bar. There, though the citation was directed to the wrong person, the party appeared, answered and defended for the right person, making no objection until he got into the Supreme Court.

The case from 4th Gray, and the other cases cited in connection with it, seem to us totally foreign to the subject.

Counsel for appellants printed with their supplemental brief the order issued on April 25th, 1885, directing the defendants to appear and show cause, and he says this order was served on the Solicitor of the Whitewater Railroad Company. An examination of the record on page 63 shows that the counsel of appellants at that very time prayed that the citation be issued, not against the Whitewater Railroad Company, but against the Whitewater Valley Railroad Company, so that the mistake here is not a mistake of the clerk, as is alleged in the brief, but is the mistake of the counsel themselves. The clerk has issued his citation for the very party that the counsel were pursuing on the 25th of April, and undoubtedly were their precipe shown it would appear that when this appeal was finally taken on the 3d day of February, 1886, the clerk was directed to issue his citation against the same Railroad Company. As matter of fact, the petition for re-allowance of appeal on April 25th, and in response to which the order to show cause in appellants' brief was issued, was dismissed (page 63), and the present appeal was taken February 3d, 1886, nearly two years after the final decree was entered. To the suggestion that we entered our appearance generally, we simply say that is a mistake. We entered our appearance for the appellees as shown by the transcript, and as

brought in by the citation and for no one else. No party was in court which had not been brought in by citation. (National Bank *v.* Omaha, 96 United States, 737.) Under these circumstances we insist that as against the Whitewater Railroad Company this case cannot be reversed.

II.

With reference to merits, namely, whether appellants have any lien as against the mortgage under which the Whitewater Railroad claims, we have little additional to say. The very agreement, exhibit A, to the bill in pursuance of which appellants certificates were issued, shows that the entire railroad from Harrison to Hagerstown was subject to the mortgage for one million dollars. (Transcript, page 8, line 2, &c.) The same agreement shows that the I. C. & L. Railroad Company took a guaranty of the Whitewater Valley Railroad Company against this mortgage (page 8, between side-pages 18 and 19); also, that the Whitewater Valley Railroad Company put the I. C. & L. Railroad Company in possession of the whole line. The same agreement shows that the I. C. & L. Railroad Company agreed to construct, at its own expense, this eight miles of road (page 10, between side-pages 24 and 25), and also agreed to equip and operate the same (page 8).

The I. C. & L. Railroad Company was to have the benefit, according to the same agreement, of all donations for the construction of that part of the road. Now, this agreement was the basis, the very foundation of all the rights claimed here by these certificate holders, and the agreement, exhibit B, to the bill of complaint on page 11 shows that Henry C. Lord and the other holders, constituting the Hagerstown association, made their contract for the certificates with this original contract. Exhibit A expressly in view. Neither in Exhibit A or

Exhibit B is one word said about any lien; nor is there any pretense of a contract executed by the Whitewater Valley Railroad Company even hinting at a lien until we come to the agreement dated April 24th, 1868, Exhibit F, but which as matter of fact was never executed until July 12th, 1869. In other words, these certificate holders never had any agreement so far as the evidence shows for a lien until long after the right of way had been acquired and this eight miles of road completed. Then, purely as an afterthought, an attempt was made by a contract between the mortgagor, the Whitewater Valley Railroad Company, and the holders of obligations against the I. C. & L. Railroad Company to force a lien under the mortgage, which had been made two years before the contract Exhibit A was executed and four years before the contract Exhibit F was executed, and which, as we have seen, the contracts Exhibits A and B recognized and referred to as a mortgage upon this entire property. How this pretended lien was to be created and made prior to the mortgage we do not see, nor do we think appellants' briefs explain. A contract in the nature of a perpetual lease is made of the Whitewater Valley property to the I. C. & L. Company, in consideration of which the latter company agrees to finish the construction of the road, and to equip and operate the same.

This contract expressly recites that the entire property is subject to the mortgage for the one million dollars. Thereupon, the lessee company, some years afterward, undertook to make a contract by which the persons who loaned to it the money to complete the road are to have a lien prior to the mortgage, and Mr. Lord being President of the Whitewater Valley Railroad Company and also manager for the holders of the certificates issued for this loan, makes a contract attempting to give the certificates priority over the mortgage; in short, causes a

new mortgage to be executed, and claims it is prior to the first mortgage executed four years before. We cannot believe that argument is necessary to defeat such a proposition.

Counsel for appellants cite a great many cases, and state many propositions of law which we do not controvert. The trouble is, neither their propositions of law nor the cases cited are pertinent to the question here. Upon the facts in this case there is no semblance of a vendor's lien, nor of an equity, upon which to give the mortgage of July 12th, 1869, priority over the original mortgage upon the property.

On page 8 of our original brief it is stated that this million dollar mortgage was executed in 1867. This is a mistake; it was executed in 1865. It was executed and the bonds issued in the usual manner in 1865.

In the brief of Mr. D. Thew Wright it is suggested that the mortgage in question was not offered in evidence. It is true the transcript does not show that it was offered in evidence, though the decree of the court shows that it was, and it shows that stipulations were made which are not in the evidence—not in the record. The manner in which this record was made up has been already alluded to in this brief, but whether offered in evidence or not, it was part of the answer. It is recited and shown in the agreements, which are exhibits to the bill of complaint, as covering the entire property when those agreements were first made.

The decree of the court shows that the case was tried upon the amended and supplemental bills of the complainants, the answers thereto, and the replications and the evidence and stipulations of counsel, and this being so, the question has to be met by the appellants,

whether the original mortgage is not prior in equity to the mortgage by which they claim their certificates are secured.

There are no facts shown which tend even to show a vendor's lien. If appellants have any standing at all it is upon the express lien created by the instrument of July 12th, 1869, which is four years junior to that on which we rely. Treating this as a valid junior lien they would have just what the Circuit Court offered them and they refused to accept a right to redeem.

W. H. H. MILLER,
Solicitor for Whitewater Valley R. R. Company.

Office Supreme Court U. S.
FILED.
OCT 15 1889
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CLERK.

IN THE

Supreme Court of the United States.

October Term 1889.

WILLIAM D. THOMPSON *et al.*, *Appellants*,
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY *et al.*
No. 26.

The White Water Railroad Company moves the Court to dismiss the appeal as against itself because said appeal, as to it, was not taken within two years next after the final decree in said cause was rendered in the Circuit Court.

W. H. H. MILLER,
Solicitor for the White Water R. R. Co.

WILLIAM D. THOMPSON *et al.*, *Appellants*,
vs.
THE WHITE WATER VALLEY RAILROAD COMPANY.
No. 26.
October Term 1889.

In support of the motion to dismiss the appeal as against the White Water Railroad Company, I beg to say the statute, section 1008, is imperative that no decree

of the Circuit Court shall be reviewed in the Supreme Court on appeal, unless the appeal is taken within two years after the entry of such decree. This statute, in so far as it fixes a time within which an appeal may be taken, is in the nature of a statute of limitations. The citation in an appeal taken after the term at which the decree is rendered is like the writ of subpœna issued to bring a party into the Circuit Court. The signing of the citation is essential to the taking of such an appeal, and fixes the time when such an appeal is taken; just as the issuing of the writ of subpœna fixes the time when the original suit is commenced. In this case the appeal, as to the White Water Valley Railroad Company, and the Indianapolis, Cincinnati & La Fayette Railroad Company, was taken within the two years. The citation was signed, as to them, within the time limited; as to the White Water Railroad Company, the citation was not signed until nearly five years after the decree was rendered. The decree was rendered on the 10th day of June, 1884, and the citation against the White Water Railroad Company was issued sometime in April (I believe), 1889.

In Miller against McIntyre (6 Peters, 61), the original bill had been filed before the bar of the suit by limitation was complete; afterward, and after the expiration of the period of limitations, an amended bill was filed making new parties. The Court said:

"It is insisted that the amended bill, filed in 1815, by which the defendants were made parties to the bill, has relation to the commencement of the suit in 1808; and consequently that the statute cannot bar, as its limitation had not then run. Until the defendants were made parties to the bill the suit cannot be considered as having been commenced against them. It would be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice, and where a final decree in the case could not have prejudiced their rights."

To the same effect is Buswell on Limitations, section 357.

I do not see why the same principle does not apply in this case and in this Court.

In Brandies *v.* Cochrane (105 U. S., 262), it is held that an appeal is perfected, so far as the Court from which it is taken is concerned, by approving the security and signing the citation. In that case the security was approved and the citation signed on the last day of the two years. It was held that because the citation was so signed within the time, the appeal was well taken. Until this citation was signed against the Whitewater Railroad Company, so far as it was concerned, there was no appeal here. In the language of the decision in Miller *v.* McIntyre (*supra*) no proceeding could be had in this Court which would in any way affect the Whitewater Railroad Company. Indeed, this Court so held in refusing to hear or decide the case last spring, before the Whitewater Railroad Company was brought into Court.

I suppose that the Court would be bound, upon the face of the papers, to take notice of the fact that this appeal was not taken in time, as that fact is jurisdictional. A case brought into this Court, after the period of limitation prescribed by the statute, has no more standing in the Court than a case where no appeal is authorized at all.

Under the circumstances, therefore, it seems to me the appeal ought to be dismissed.

W. H. H. MILLER,
Solicitor for the Whitewater R. R. Co.